

No. 16053

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United States  
Court of Appeals  
for the Ninth Circuit

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JEAN DOBLER,

Appellant,

vs.

OLETA STORY,

Appellee.

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Transcript of Record

FILED

DEC 17 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

O. VINCENT BRUNO, ESQ.,

447 North First Street,

San Jose, California,

For Appellant.

LEWIS, SCHER & FERNANDEZ,

JOSEPH F. LEWIS, ESQ.,

226 South Murphy Avenue,

Sunnyvale, California,

For Appellee.





In the United States District Court for the  
Northern District of California, Southern Division

Civil Acton No. 35867

OLETA STORY,

Plaintiff,

vs.

JEAN DOBLER, FIRST DOE, SECOND DOE  
and THIRD DOE,

Defendants,

COMPLAINT FOR DAMAGES  
(Personal Injuries)

Plaintiff complains of defendants, and each of  
them, and for cause of action alleges:

I.

That she is a citizen of the State of California  
and the defendant Jean Dobler is a citizen of the  
State of Texas. The matter in controversy exceeds,  
exclusive of interest and costs, the sum of Three  
Thousand Dollars.

II.

That plaintiff is ignorant of the true names of  
the parties sued herein as First Doe, Second Doe  
and Third Doe, and she asks leave of the Court  
that when the true names are made known to her  
that she be permitted to insert the true names herein  
with appropriate allegations in place of said ficti-  
tious names used herein.

## III.

That on October 2, 1955, at approximately 9:00 a.m., on a public highway, U. S. Highway 101, at its intersection with Sir Francis Drake Boulevard, in Marin County, California, the defendant Jean Dobler so carelessly and negligently operated a certain 1955 Chevrolet two-door sedan automobile so as to cause it to be driven against a certain 1953 Dodge two-door sedan in which plaintiff was riding as a guest passenger.

## IV.

That at all times herein mentioned the defendant Jean Dobler was driving and operating the vehicle aforesaid with the consent and permission of the true owners, Jean Dobler, First Doe and Second Doe.

## V.

That as a direct and proximate result of the carelessness and negligence of the defendants, and each of them, plaintiff Oleta Story sustained severe personal injuries, to wit: a severe injury to the neck and back, a severe head injury, great and severe nervous shock and great and severe physical and mental pain and suffering; and plaintiff is informed and believes, and upon such information and belief alleges, that these injuries are of a permanent nature; all to plaintiff's general damages in the amount of \$50,000.00.

## VI.

That as a further direct and proximate result of the carelessness and negligence of the defendants,

and each of them, plaintiff Oleta Story has incurred necessary medical expenses for the care and treatment of said injuries, and will continue to incur medical expenses for a long period of time in the future; that plaintiff does not know the amount of these expenses at the present time, and she prays leave that when the same become made known to her she may be permitted to amend her complaint to insert the same with appropriate allegations.

## VII.

That as a further direct and proximate result of the carelessness and negligence of the defendants, and each of them, plaintiff Oleta Story has incurred loss of earnings and impairment of earning capacity which at the present time is unknown to plaintiff, and she asks leave of the Court that when the same become known to her that she be permitted to amend her complaint with appropriate allegations.

As and for a Second, Separate and Independent Cause of Action, Comes Now the Plaintiff and Complains of Defendants Above Named. and Each of Them, and Alleges:

## I.

Incorporates herein by reference as fully as though set forth at length, the allegations contained in paragraphs I, II, III, V, VI and VII of the first cause of action.

## II.

That at all times herein mentioned defendant Jean Dobler was the agent and servant, and acting within the course of her employment of her employer, Third Doe.

Wherefore, plaintiff prays judgment against defendants, and each of them, as follows:

1. General damages in the sum of \$50,000.00;
2. Special damages for medical expenses according to proof;
3. Loss of earnings and impairment of earning capacity as proved;
4. Costs of suit;
5. Such other and further relief as the Court may deem just.

/s/ JOSEPH F. LEWIS,

Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 27, 1956.

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[Title of District Court and Cause.]

## ANSWER

Comes now the defendant Jean Dobler, and in answer to the complaint of the plaintiff on file herein, admits, denies and alleges:

## I.

Denies each and every allegation contained in Paragraphs numbered III, IV, V, VI and VII of plaintiff's first alleged cause of action; and further answering the allegations contained in Paragraph numbered V, specifically denies that the plaintiff was damaged in the sum of \$50,000.00, or in any other sum, or at all.

## II.

Answering the allegations contained in Paragraph numbered I of plaintiff's second alleged cause of action, answering defendant repeats and realleges each and every admission, denial and allegation hereinabove contained with reference thereto.

## III.

Denies each and every allegation contained in Paragraph numbered II of plaintiff's second alleged cause of action.

As and for a Second, Separate and Distinet Defense,  
Answering Defendant Alleges:

## I.

That on the 29th day of November, 1955, the plaintiff for valuable consideration, released the defendant from all liability to the plaintiff on any and all claims of the plaintiff against the defendant which existed at the time of the said release, or which might thereafter arise against the defendant from or on account of anything done by the defendant prior to the date of the said release, and including the alleged claim set forth in the complaint.



As and for a Third, Separate and Distinct Defense to Both Causes of Action, and for the Defense of Contributory Negligence, Answering Defendant Alleges:

I.

That plaintiff was herself negligent and careless in and about the matters referred to in her said complaint, and that said negligence and carelessness on the part of the plaintiff proximately contributed to and was a proximate contributing cause of her damage, if any.

As and for a Fourth, Separate and Distinct Defense to Both Causes of Action, and for the Defense of Unavoidable Accident, Answering Defendant Alleges:

I.

That the injuries and damages sustained by plaintiff, if any, at the time and place of said accident, were the direct and proximate result of an unavoidable accident, or mere misadventure without negligence on the part of this defendant.

Wherefore, answering defendant prays that plaintiff take nothing by reason of her complaint on file herein, together with the costs and disbursements of this action, and for such other and further relief as to the Court may seem just and proper.

/s/ O. VINCENT BRUNO,

Attorney for Said Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed November 19, 1956.

State of California,  
County of Santa Clara—ss.

O. Vincent Bruno, being first duly sworn, deposes and says:

That he is the attorney for Jean Dobler, the answering defendant in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein alleged on information and belief, and as to those, that he believes it to be true; that the reason this verification is made by your deponent is that the answering defendant is outside the county where said attorney has his offices.

/s/ O. VINCENT BRUNO.

Subscribed and sworn to before me this 15th day of November, 1956.

[Seal]      /s/ JANE M. WISE,  
Notary Public in and for the County of Santa Clara,  
State of California.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND JUDGMENT

The above-entitled cause came on regularly for trial on December 30, 1957, and again on January 31, 1958, in the above-entitled Court, before the

Honorable O. D. Hamlin, presiding without a jury, plaintiff appearing in person and by her attorney, William J. Fernandez, and defendant appearing by her attorney, O. Vincent Bruno, and evidence, both oral and documentary, having been introduced, and said Cause having been submitted to the Court, the Court makes its findings of fact as follows:

### Findings of Fact

#### I.

That at the commencement of the within action, plaintiff was a citizen of the State of California and defendant, Jean Dobler, was a citizen of the State of Texas.

#### II.

That on October 2, 1955, at approximately 9:00 o'clock a.m., on a public highway, to wit: U. S. Highway 101 at its intersection with Sir Francis Drake Boulevard, in Marin County, California, the defendant Jean Dobler negligently and carelessly operated her 1955 Chevrolet 2-door sedan, so as to cause it to strike the rear end of a 1955 Chevrolet coupe in which plaintiff was riding as a guest passenger.

#### III.

That as a direct and proximate result of the carelessness and negligence of the defendant, Jean Dobler, the plaintiff, Oleta Story, sustained injuries to her body, including injury to her neck, nervous shock and physical and mental pain and suffering,



all to plaintiff's general damage in the amount of \$2400.00.

IV.

That plaintiff, Oleta Story, has incurred necessary medical expenses for the care and treatment of the injuries mentioned in the paragraph above in the sum of \$265.00.

V.

That at the time that the plaintiff signed a release of all claims, releasing defendant from all liability for the accident of October 2, 1955, the plaintiff did not know or understand that the release signed by her covered her claim for personal injuries, and that the plaintiff believed that at the time she signed the release she was releasing only her claim for property damage to her 1955 Chevrolet automobile, owned jointly by plaintiff and her husband.

VI.

That plaintiff was not herself negligent and careless in and about the matters referred to in her complaint on file herein.

VII.

That the injuries and damages sustained by plaintiff were not the direct and proximate result of an unavoidable accident or mere misadventure.

Conclusions of Law

I.

That this Court has jurisdiction over all the parties to, and the subject matter of, this action.

## II.

That the release signed by the plaintiff did not bar recovery by her in this action.

## III.

That the plaintiff is entitled to judgment against the defendant for the sum of \$2400.00 general damages; \$265.00 special damages; and costs of suit.

Dated: March 24, 1958.

/s/ O. D. HAMLIN,

United States District Judge.

Lodged March 10, 1958.

[Endorsed]: Filed March 25, 1958.

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In the United States District Court for the Northern  
District of California, Southern Division

File No. 35867

OLETA STORY,

Plaintiff,

vs.

JEAN DOBLER, et al.,

Defendants.

### JUDGMENT ON FINDINGS

The above-entitled Cause came on regularly for trial, William J. Fernandez appearing as counsel for plaintiff, and O. Vincent Bruno appearing for the defendant. A trial by jury having been expressly

waived, the cause was tried before the Court sitting without a jury, whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined, and the evidence being closed, causes submitted thereon, and the Court made its findings and decisions in writing as follows: The Court finds that the plaintiff did not know or understand that the release signed by her covered her claim for personal injuries; the Court further finds that plaintiff is entitled to judgment against defendant Jean Dobler in the sum of \$2,665.00 and costs of suit. Said findings have been filed by the Court and it has been ordered that judgment be entered in accordance therewith. Wherefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered that plaintiff Oleta Story do have and recover from defendant Jean Dobler the sum of \$2,665.00 together with costs of suit in the sum of .....

Dated: This 24th day of March, 1958.

/s/ O. D. HAMLIN,  
Judge.

Lodged February 26, 1958.

[Endorsed]: Filed and entered March 25, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR  
NEW TRIAL

To: Oleta Story, Plaintiff, and to Lewis, Scher &  
Fernandez, Her Attorneys:

You, and Each of You, Will Please Take Notice that on the 10th day of April, 1958, at the hour of 9:30 o'clock a.m., in the forenoon of said day, or as soon thereafter as counsel can be heard, the defendant will move his Honor, Judge O. D. Hamlin, in his courtroom in the United States District Court of the Northern District of California, Southern Division, at the court house in the City and County of San Francisco, State of California, for an order vacating the judgment on findings heretofore filed herein under date of March 25, 1958, and for a further order granting a new trial to the defendant above named, and for such other order or orders as may seem just and proper.

This motion will be based upon the files, records and transcripts of testimony taken in this action, upon all the proceedings heretofore had herein, and upon the grounds that:

1. That the Court was manifestly in error in alleging as it appears from its written opinion upon which it rested its final determination that said release signed by said plaintiff was not a bar to any recovery herein.

2. That the findings are against the evidence.

3. That the findings are against the law.
4. That the Court erred in findings of fact that the Court herein had jurisdiction of the matter.
5. That the Court erred in entering judgment for the plaintiff.

Dated: This 31st day of March, 1958.

/s/ O. VINCENT BRUNO,  
Attorney for Said Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 3, 1958.

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[Title of District Court and Cause.]

### ORDER

The defendants' motion for a new trial may be, and the same is, hereby denied.

Dated: April 21, 1958.

/s/ O. D. HAMLIN,  
United States District Judge.

[Endorsed]: Filed April 22, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the defendant Jean Dobler above named, hereby appeals to the United



States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 25th day of March, 1958, and from each and every portion thereof.

Dated: May 7, 1958.

/s/ O. VINCENT BRUNO,

Attorney for Defendant and  
Appellant Jean Dobler.

Affidavit of service by mail attached.

[Endorsed]: Filed May 13, 1958.

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The United States District Court, Northern District  
of California, Southern Division  
No. 35867

OLETA STORY,

Plaintiff,

vs.

JEAN DOBLER, et al.,

Defendants.

Before: Hon. Oliver D. Hamlin, Judge.

TRANSCRIPT OF PROCEEDINGS

December 30, 1957

Appearances:

For the Plaintiff:

LEWIS, SCHER & FERNANDEZ, By  
WILLIAM J. FERNANDEZ, ESQ.

For the Defendants:

O. VINCENT BRUNO, ESQ.

The Clerk: Oleta Story versus Jean Dobler, for trial.

Mr. Fernandez: Ready for the plaintiff.

Mr. Bruno: Ready for the defendant, and at this time I would like to request the Court, pursuant to a stipulation, that the affirmative defense relief which is alleged in the answer of the defendant, be tried prior to any trial on the merits, which I think would make a sensible proceeding.

The Court: Is that agreeable, counsel?

Mr. Fernandez: Agreeable, your Honor.

Mr. Bruno: Shall we proceed, your Honor?

The Court: Yes.

Mr. Fernandez: If the Court please, William J. Fernandez, attorney for the plaintiff. If the Court please, I would like to make one preliminary statement for the record:

I believe it is the usual rule in cases dealing with compromises and releases to show in some manner or other that you have made an offer to return the amount received. In this case, we have received \$100.

However, on the basis of our theory of the case, it is this, that we are not attempting to avoid the contract which has been made, but are trying to show that we did not make the contract which we apparently made. [3\*]

In other words, we believed when we signed the release that we were only releasing our collision damages and not our rights to any injuries to our body, and on that basis and on the basis of civil

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

California cases which I have read, it is not necessary to make a tender of the amount received.

However, with this understanding in mind, for the record I make the official tender in Court to return the \$100 that we got for the collision coverage—for the record.

The Court: All right.

Mr. Fernandez: Will you take the stand, please, Mrs. Story?

Mr. Bruno: And the burden of proof is on the defendant, isn't that correct? I think the defendant should proceed.

The Clerk: State your appearance for the record.

Mr. Bruno: O. Vincent Bruno, attorney for the defendant, Jean Dobler.

As a preliminary statement, your Honor, I would like to outline just very briefly what occurred in this matter so that it may have a little more continuity for the Court:

At the outset, it would be clear that an automobile accident occurred at the Greenbrae intersection in the rural section of Marin County, in the State of California, on October 2, 1955, at approximately 9:00 o'clock p.m.

The evidence is rather clear that in the one car [4] being operated by Thurman B. Story, the husband of Oleta Story, the plaintiff in this proceeding, was driving Oleta Story, the plaintiff, together with some children. The other vehicle——

The Court: You say that the car was driven by the husband of the plaintiff?



Mr. Bruno: Yes, your Honor. And the plaintiff was riding in the car.

The driver I represent, Jean Dobler, is an Army nurse stationed in Marin County at the time, and she is now, incidentally, stationed in Germany, struck the rear of the vehicle of Mr. Story. This occurred on October 2, 1955, and I think it will become clear that on November 29, 1955, almost two months following the accident, a general release of all claims for personal injuries and property damage was signed by Mrs. Oleta Story, the plaintiff in this case. She was paid the sum of \$330.80 as consideration for the release, which sum has never been offered back to the defendant until this morning, a few minutes ago, and which offer I feel is a little late under the adjudicated cases.

Now, with reference to the law, I assume your Honor would prefer to hear the evidence first rather than argue the law.

The Court: Well, no, I would rather hear your theory first so that maybe I can understand the evidence a little better. [5]

Mr. Bruno: All right, your Honor.

Now, this is a general release, which I think the evidence will clearly indicate that it could be stipulated to, that Mrs. Story signed, and that she signed it at a time when she was of clear mind, she understood it, she could read it, and she had ample opportunity to read the release.

The evidence will show the release came in the mail from her own insurance company.

It will be shown in the evidence that the defendant, or the defendant's own insurance carrier or the defendant's agent, had absolutely nothing to do with Mrs. Story signing this release, that they never had any contact with her at all. She received this release of claim in the mail, and she signed it and had her husband sign it, and sent it back and subsequently received the consideration called for in the release.

The sanctity of a release under the law of the State of California is too obvious for me to go into, I think, your Honor, and the possible defenses that the plaintiff has against the effect of this release would seem to me to be, as developed by the interrogatories and the deposition of the plaintiff, to the general effect that she didn't know what she was signing. She doesn't claim any fraud, she doesn't claim any duress, she doesn't claim any unfairness, over-reaching. She doesn't claim any act whatsoever on the part of the defendant or defendant's agents.

She claims merely that, apparently, she didn't know what she was signing.

The evidence will clearly show that she knew she had sustained a whiplash injury of the neck, and I think it's a minor one, at the time the accident occurred. And the evidence will show that she signed a report indicating she had sustained a whiplash injury of the neck on October 4, two days after the accident, and signed this release willingly on November 29, 1955.

The release is duly witnessed by two witnesses, both of whom I believe were residents of a motel where the Story's were staying in Marin County at

the time, and the signatures were notarized by a Mr. Rutledge, a notary public, whom we have never been able to locate, but I don't think there is any question about it, about the acknowledgment of the signatures.

So the only defense that apparently is going to be presented is either that she didn't know the extent of her injuries, supposing she were injured at all, which the evidence will show is not true.

Secondly, according to the statement of Mr. Fernandez, that the plaintiff did not know what she was signing.

In California, there are two general defenses to the effect of a release, and the law is in conformity throughout the United States on the subject.

Generally, one, that there was no release at all [7] because of some fraud, duress, or over-reaching in the first instance, in which event you have a case of the release being void *ab initio*—at the outset there never was a release, never was a contract, or there was such a mutual mistake of fact—mutual mistake of fact—that there was never any meeting of the minds of the parties.

This apparently does not apply to this case and it's apparently not being alleged.

The second general classes of cases are those which are alleged in Section 1,689 of the Civil Code of the State of California, which provides that a party may rescind a contract, including, of course, a release, in six specific instances, one being where consent was obtained by mistake or fraud, duress, undue influence, and where this fraud and undue in-

fluence, and so forth, was exercised by the defendant, by the other contracting party, or through his compliance.

And the second general category is where, through the fault of the party against whom the decision is sought, there has been a mutual mistake of fact.

That is the second category.

The third category, if the consideration fails at the outset.

The fourth category is where consideration fails after the contract is made, a failure in consideration; the fifth category being where there is consent of all parties, [8] and the sixth being under circumstances outlined in Sections 1785 and 1789 of this Code. And those sections, your Honor, I know are not applicable. I can't refer the Court to the exact language of those.

Apparently what is being claimed here is the fact that there was some sort of mistake, but it was a unilateral mistake, a mistake on the part of plaintiff herself and no one else. There is certainly no mistake on our part. We clearly understand what was done, and clearly appreciated the fact and were satisfied with the result. So that there was no mutual mistake.

The release, the evidence will show, is written in plain English. It's a release of personal injuries and damage to property, loss of services, medical expenses, loss of damages of every kind, and it specifically states that the releasor has read and clearly understands everything in the release.

The release clearly states that, "The foregoing



release has been carefully read, we know the contents thereof, and sign the same as my own free act, and have not been influenced in making this settlement by any representation of the party or parties released.”

So if a mutual mistake in fact, or a mistake of fact, is alleged, they have failed for that reason. If it is a unilateral mistake, that is no defense—no defense at all. [9]

The second point, since this is the type of case where rescission must be had under the law, there has never been any rescission. We have never received an offer back of the \$100. We received it today in Court, which is certainly too late because the rights of the plaintiff are fixed as of the date of filing the complaint and the time the defendant filed its answer.

The rights are not fixed as of this time, so that the rescission required under the Civil Code must have been exercised before. And that I say because of the specific provisions of Section 1691 of the Civil Code of the State of California. This is a new section.

Rescission in 1691 of the Civil Code, your Honor, specifically provides that rescission, when not effected pursuant to a consent of all parties, can be accomplished only by the action on the part of the rescinding party of reasonable diligence to comply with the following rules. And this is the way rescission is accomplished.

One, when the rescinder promptly upon the discovery of the facts—when you rescind promptly

upon the discovery of the facts which entitle you to rescind.

Well, the accident occurred November 2, 1955. The release was signed on November 29, 1955, and we get a purported release here in December, 1957. I think that that does not fall within the category of "reasonable diligence" to exercise [10] the right of rescission that is required.

Secondly, in order to exercise this right of rescission, he must restore to the other party everything of value which he has received from him under the contract, which has never been restored—\$100, as Mr. Fernandez says, and I say it is \$380.80. That has never been restored to the defendant.

I say, therefore, to your Honor, that that is our theory of the law. Some of it is, of course, anticipatory because I don't know precisely the defense being proposed by the plaintiff. I assume it is what counsel has stated, that she didn't know what she was signing. If that is the defense, and if this is considered an opening statement, I would think I could submit the matter merely on the argument now, because as a matter of law, even if proved that she didn't know what she was signing although she had an opportunity to read it, that would be no defense.

Mr. Fernandez: I have an opening statement to make. I only made that prior statement to comport with one small segment of what I thought the law was. I believe some of the facts have been stated, but I think they need further amplification.

This accident which occurred was a rear-end type

of collision. We were rear-ended by the defendant. We were stopped at an intersection. At all events, to an outsider [11] looking at the case, it would seem to be a case of liability on the side of the defendant.

Now, in our evidence we will try to show that the negotiation for this entire release which was signed and which counsel has a copy of was conducted between Mrs. Story and her insurance company. It was her understanding through her conversations with her insurance company that when she signed the papers she was giving up only her rights in so far as claiming back the \$100 deductible which she had to pay to repair her automobile.

Now, we will show by testimony that the \$330 and so many cents which forms the consideration for this release of all claims was the property damage, the cost of repairs to the Story automobile.

We will further show that the release, right on its face, it shows that the insurance company, the American Insurance Company, was Mrs. Story's own insurance company. They signed the release also releasing any claim they had to property damage.

Now, it is our position that when Mrs. Story signed this release, she understood it to only cover any claim she may have had against the defendant on her automobile collision—excuse me, for her property damage. When she signed it for her company, it was necessary for her company to have this release in order that it could collect back its property damage [12] claim. She did not think that she was signing away all of her rights, because at the

time the release was signed, as counsel has pointed out, she was suffering physical injury. She was suffering pains to her neck. Whether minor or major, she was suffering them, and she did not intend to give up any claims she had to her physical trouble.

Now, on this state of facts, I present my theory of what the law is, what the law of California states on this particular type of thing.

Initially, under the Civil Code of California, Section 1550.7, that it is essential to the existence of a contract that there should be parties capable of contracting, that there be consent, et cetera.

Now, the important point is this, that there should be consent.

The next step, the essentials of consent: "The consent of parties to a contract must be free, mutual and communicated."

This is Section CCC-1565.

Section 1567 says: "Apparent consent, when not free. Apparent consent is not free when obtained through menace, fraud, undue influence or mistake."

Now, Section 1577 is called, "Mistake of Fact. Mistake of Fact is mistake not caused by neglect of a legal duty on the part of the person making the mistake, and consisting [13] of an unconscious ignorance or forgetfulness of a fact that is material to the contract; or, two, belief in present existence of a thing material to the contract which did not exist during the past existence, or such a thing which has not existed."

Now, counsel points out that this mistake could be either mutual or unilateral. He claims it is



unilateral, and he says that under that state of facts the law of California says you can't recover.

Well, I beg to differ with him.

According to the case of *Forest Lawn versus De-Jarnette*, 79 Cal. Ap. 601, and *Lepper versus Rat-terre*, 98 Cal. Ap. 245, and also Civil Code 1576, unilateral mistake is sufficient to rescind the contract.

Now, I have gone further than that, your Honor. I have researched several cases on the particular theory that we are going under, and I think that the leading case or the earliest case that I can find in California is the case of *Meyer versus Haas*, 126 Cal. 560. In this case, the plaintiff signed a release for \$25, which he thought covered loss of time only, but which actually released all claims. The Court held that the release could be voided. In other words, there was a jury trial and findings of fact that this was so, and on the trial the Court said that the release could be voided.

Now, there are other cases to the same effect. One which I think is closely in point to this case is *Raynale versus [14] Yellow Cab Company*, 115 Cal. Ap. 90. The case is where the plaintiff signed a release for \$45 for her damaged coat, believing it covered only the damages to the coat. The Court held the release was void because there was no contract because the minds never met, or at most, no contract beyond the boundaries of mutual intent.

Now, there are other cases. *Tyner versus Axt*, 113 Cal. Ap. 408. This is a case where the plaintiff signed the release believing the settlement was only

for medical bills. She did not understand it was intended to effect a general release for the defendant. Held, a finding of fact, that the release could be voided was sustained by the evidence, and they followed the ruling of *Smith versus Occidental*, 99 Cal. 462.

The Court: You seem to be awfully far back in your cases there, counsel.

Mr. Fernandez: I am working my way up, your Honor.

The Court: I haven't heard of a Cal. Ap. 2d or a Cal. 2d yet.

Mr. Fernandez: Here is a real recent one: *Jordan versus . . . . .*, 23 Cal. 2d 469. Releases signed by the plaintiff. This is a husband and wife situation.

The plaintiff's father who had signed the release, had gotten to the 7th grade. He knew the settlement was final and was satisfied with it, but did not know that he had a right to anything except the items for funeral expenses and time lost, [15] which were the only subjects of discussion, and as he thought that those were all that the releases covered, held that the release could be voided.

Mr. Bruno: You are not quite citing that page correctly.

Mr. Fernandez: Well, there was probably some more if you want to cite it. I just took a brief capsule.

Mr. Bruno: The jury told the plaintiff that was all he was entitled to.

Mr. Fernandez: I think it was also on the ground of mistake, as I recall reading the facts.

Here's another one, Weiztein versus Thomason, 34 Cal. Ap. 2d 554. Plaintiff signed a release believing it was only for payment for auto repairs and medical to the date of the release. Held, a party signing an instrument will not be held by it unless he assented to it, and if he did not in reality assent, such want of assent can be shown in order to avoid the effect of his signature.

Here is another case which I think is very interesting: Mairo versus Yellow Cab Company, 208 Cal. 350.

The lower Court directed a verdict for the defendant. It appeared that in this case the plaintiff signed three releases, and the plaintiff testified that he thought the first release was in order that he might be operated upon, the second release was a release for a new suit, and the third release [16] was a release for wages. The Court held it was a question of fact to determine whether the plaintiff knew or didn't know what he was signing, and, if he didn't know, the releases were void.

I have got a few other citations.

The Court: Well, let's proceed. I wanted to get your theories of counsel on either side.

Mr. Fernandez: Just one final point, your Honor: Counsel states that it is necessary to make a tender early in the game. Well, I don't think California law required that it be made too early. I think it can be made at the time of trial.

However, on the basis of our theory, and on the

basis of Meyer versus Haas and Raynale versus Yellow Cab Company, they state this, that in this particular situation where you are trying to say, "We thought this contract we are talking about was only for one small segment of our claim, it's not for all of our claim but for one small segment of it," in that particular type of factual situation it is not necessary to make a tender back because all you are saying is, "Well, sure, we settled for automobile collision damages, in other words, for our property damage, and so we thought we were making a contract and were getting back our \$100 for that, so it isn't necessary for us to retract."

Now, when I came into Court and made this statement earlier, I just wanted to point that fact out to you and then go on to say if counsel wants us to make a formal tender of what [17] he considers what the California law is, I will make it because I believe we can do it at any time.

The Court: Well, I don't think you can go on the basis that if counsel wants you to do something. I think you should do whatever you want to do yourself and then let's determine whether it is sufficient or not. But I don't think you can take the position that you will only do something if counsel wants you to do it.

Mr. Fernandez: No. I wanted to be sure I had that covered under all circumstances, your Honor.

The Court: All right.

Mr. Bruno: Your Honor, at this time we would like to call Oleta Story to the stand as an adverse witness under Rule 43B.



OLETA STORY

called as an adverse witness by the defendant under Rule 43B, being first duly sworn, was examined and testified as follows:

The Court: State your name, please.

The Witness: Oleta Story.

The Court: Keep your voice up so that we can all hear you, please.

Direct Examination

By Mr. Bruno:

Q. Where do you live, Mrs. Story, please?

A. 962 Moorpark, San Jose. [18]

Q. You are the plaintiff in this case, is that correct, Mrs. Story? A. Yes, I am.

Q. And you are married to Thurman B. Story?

A. Yes.

Q. And he was the owner of a vehicle which was being operated on October 2, 1955? A. Yes.

Q. You were a passenger in that car?

A. Yes.

Q. And it was involved in an accident, is that correct? A. Yes.

Q. On October 4, 1955, two days after this accident, Mrs. Story, did you not make a report through Brown Brothers Adjusters of San Jose to the American Insurance Company?

A. I called Raines Chevrolet where we bought the car, because we bought our insurance there from an agent, and reported the damage to the car.

Q. All right. And at that time you filled out an

(Testimony of Oleta Story.)

accident report for Mr. Raines and for your insurance company, is that correct?      A. Yes.

Q. I will show you a document dated October 4, 1955, with signature, "Oleta Story," at the bottom, and ask you to examine the document and see if that is not the original report that [19] was turned in to your insurance company.

A. That is my signature, yes.

Q. And do you remember the report?

A. No, I don't remember.

Q. That is your signature?

A. That is my signature.

Q. All right. Do you recall reading or filling out that document on October 4, 1955?

A. No, I didn't fill it out.

Q. Who did you give the information to to fill out the document?

A. To Mr. Brown, I believe.

The Court: To who? I don't hear you.

The Witness: A Mr. Brown, I think, come to look at the car.

Mr. Bruno: We would like to offer this in evidence, your Honor.

The Court: Defendant's Exhibit A.

(Whereupon, the accident report above referred to was marked Defendant's Exhibit A in evidence.)

The Court: Do you recall where this was signed, Mrs. Story?

The Witness: I was at my sister's house. I

(Testimony of Oleta Story.)

brought the car from Marin County to my sister's house so they could look at it, and I was at my sister's house on Alberta Avenue in [20] Sunnyvale—or Cupertino, actually, is what her address was, between Sunnyvale and Cupertino.

The Court: Well, how did you happen to sign this? Who was there?

The Witness: There wasn't anyone there but just him.

The Court: Well, who?

The Witness: There wasn't anyone there but just this one man that looked at the car to see the extent of the damages to the car. I thought it was someone——

The Court (Interposing): Well, your husband—it starts out that the name of the insured is your husband, Thurman B. Story.

The Witness: Yes.

The Court: Was he there?

The Witness: No, he was working. He was in Marin County working.

The Court: You say this was some man from Brown Brothers?

The Witness: Well, I thought from my insurance company. Now, I don't know where he was from. I reported the accident to my insurance company.

The Court: And who was that?

The Witness: Well, I called Raines Chevrolet and talked to the agent there and reported my accident. They have [21] an agent there. We bought

(Testimony of Oleta Story.)

our insurance there at the time we bought our car.

Mr. Bruno: I think, your Honor, we can stipulate her insurance company would be the American Insurance Company.

Mr. Fernandez: That's right, I can stipulate to that.

The Court: All right.

Mr. Bruno: And that Brown Brothers Adjusters was handling the case for her insurance company, that is what I mean.

The Court: All right.

Mr. Fernandez: And what she remembers is a fellow named Brown.

Mr. Bruno: Yes. I say we will stipulate to that.

Mr. Fernandez: Yes.

The Court: All right, proceed.

Q. (By Mr. Bruno): Mrs. Story, at the time you completed this report, you had some pain in the neck area, is that correct?

A. Had a terrific headache, yes.

Q. You had a terrific headache and you also had pain in the neck?

A. And I was terrifically nervous.

Q. And you filled out this form on the back here where it says, "Personal Injuries," you said, "Whiplash"? [22]

A. No, I didn't.

Q. Well, you had somebody put down "whiplash"?

A. No, I didn't say anything about a whiplash.

Q. Who put that down there, then?

A. I don't know.



(Testimony of Oleta Story.)

Q. Was it there when you signed the document?

A. I told them that my neck popped and I had a terrific headache, but I didn't put anything down there. All I did was put my name.

Q. You read this document before you signed it?

A. No, I didn't.

Q. Well, nevertheless, the fact is your neck hurt, your head ached, and you knew that you had some injury on October 4, 1955, two days after the accident, is that correct?

A. Yes. On October 3, I couldn't get out of bed.

Q. October 3, you spent the entire day in bed? That is two days after the accident, is that correct?

A. That is right.

Q. And you were highly nervous the day after the accident, isn't that correct?

A. I was highly nervous the day of the accident, directly after the accident.

Q. And you had pain in the back of your head, right at the base of the skull, that ran into your neck and gave you a headache, too, isn't that correct? [23]

A. It come to the front of my head.

The Court: A little louder, please. I can't hear you.

The Witness: It come to the front of my head.

Q. (By Mr. Bruno): Now, ma'am, you never dealt, did you, with Jean I. Dobler or any agent or anyone claiming to be the agent or representative of Jean Dobler, is that correct?

A. That's correct.

(Testimony of Oleta Story.)

Q. The only one you ever dealt with in this transaction was your own insurance company?

A. That is what I was under the understanding, yes.

A. All right.

Mr. Bruno: I think I have the original here. You have seen this?

Mr. Fernandez: Yes.

Q. (By Mr. Bruno): I am going to show you a document entitled, "Release of All Claims," dated November 29, 1955, and signed "Therman Story and Oleta Story," and acknowledged by a Mr. Rutledge apparently as a notary public, and ask you if you recognize that document.

A. I recognize the signature.

Q. Is that your signature and that other signature that of your husband? A. Yes.

Mr. Bruno: I would like to offer this [24] general release into evidence, your Honor.

The Court: Defendant's Exhibit B.

(Whereupon, the general release was admitted into evidence as Defendant's Exhibit B.)

Q. (By Mr. Bruno): Mrs. Story, from whom did you receive this release?

A. You mean who mailed it to us?

Q. You received it in the mail, is that correct?

A. I received it in the mail.

Q. Did you get it from Mr. Raines, your insurance broker?

(Testimony of Oleta Story.)

Mr. Fernandez: I don't think Mr. Raines is an insurance broker.

The Witness: No.

The Court: You got it in the mail?

The Witness: We got it in the mail.

The Court: Was there a letter accompanying it?

The Witness: There was just a short note in it that we were to take it before a notary and sign it.

The Court: Was the note typed?

The Witness: Yes, it was typed.

The Court: And was there a signature to that?

The Witness: There was, but I don't remember the signature to it.

The Court: Do you know what happened to that note?

The Witness: No, I don't. I don't have it. [25]

Q. (By Mr. Bruno): By whom was the note signed? A. I don't know.

Q. Do you recall that it came from the Raines office or from the American Insurance Company?

A. It came from the Raines office.

The Court: From whose office?

The Witness: Raines Chevrolet.

The Court: How do you spell that?

The Witness: R-a-i-n-e-s, I believe.

Q. (By Mr. Bruno): That is Otis Raines, isn't that right? A. Yes, I think so.

Q. He is the man who sold you your insurance?

A. Well, they have an agent there that sold it to us. He didn't sell it to us direct, I don't believe, but we bought it at his place of business, yes.

(Testimony of Oleta Story.)

Q. When you bought the car, you bought the car and the insurance together? A. Yes.

Q. Now, you don't have that note you received from Mr. Raines' office, is that correct?

A. No, I don't.

Q. And all you recall it says is that you should read it and sign it before a notary public?

Mr. Fernandez: That isn't what she said. [26]

Mr. Bruno: This is cross-examination.

The Witness: No, I remember that it said to have it signed before a notary public.

Q. (By Mr. Bruno): What?

A. I remember that it said to have it signed before a notary.

Q. Now, Mrs. Story, you received that at home, is that correct? A. That is right.

Q. And nobody told you that it had to be back at a particular time, is that correct?

A. Well, I have the understanding——

Q. No, just answer the question.

Did anybody tell you it had to be back by a particular time?

A. Immediately, or by return mail, something like that.

Q. Did you have plenty of time to read the document?

A. I did, yes. I could have read it.

Q. And was Mr. Story at home at the time?

A. No, he was working.

Q. Did you sign the document before you took it to Mr. Story?



(Testimony of Oleta Story.)

A. No, I picked him up on the job. I went out on the job and picked him up and we went before a notary and signed it.

Q. The same day you received the document? [27]

A. I think so. I am not sure.

Q. And you went before Mr. Rutledge, and that would be on November 29th?

A. It was a woman.

Q. Her last names was Rutledge, apparently, is that correct?      A. I suppose.

The Court: Where is she?

The Witness: In San Rafael. I don't know the exact street that she was on. We weren't too familiar with San Rafael.

The Court: Did you know her?

The Witness: No, I didn't know her.

Q. (By Mr. Bruno): And you also had a Mrs. Don Bowen and a Dorothy MacDonald witness your signatures, is that correct?

A. The next morning I asked them if they would sign it.

Q. And they were folks who lived there in the motel where you were staying?

A. Mrs. Bowen owned the motel.

Q. Mrs. Bowen owned the motel? And you signed this free from any duress? Nobody forced you to sign it?

A. No, I wasn't forced to sign it.

Q. Nobody tricked you into signing it?

A. Well, I don't know whether you would call



(Testimony of Oleta Story.)

it a trick or not. I didn't understand it. I thought I was signing it for my insurance company. [28]

Q. Well, now, ma'am, you read English, don't you?      A. I do, yes.

Q. This isn't a very long document. Do you mean to tell the Court you didn't read this document? It's short, just two or three paragraphs.

A. No, I didn't read it.

Q. Will you read it and see if you can read it now and understand it?

(Witness reading document.)

Q. Have you read it?      A. Yes.

Q. You understand it, don't you?

A. I understand it all right.

Q. As I understand, nobody forced you to sign the document?

A. No, no one forced me to sign it.

Q. And you had ample opportunity to read the document?

A. Well, I had an opportunity to read it, yes, but I was just trusting my insurance company.

The Court: You what?

The Witness: The conversation that I had on the phone. I had a conversation with a Mr. Brown on the phone, and he said they were sending the papers to us to sign and to take them before a notary and sign them, and to return them to them, and I was under the understanding that it was papers for them to collect their money for having

(Testimony of Oleta Story.)

our car fixed, and so I just [29] took the papers and signed them.

Mr. Bruno: I move to strike out that portion of the answer which contains her understanding as not being responsive.

The Court: Motion will be denied.

Q. (By Mr. Bruno): Now, no one was present there at the time you signed it?

A. No one but my husband and the notary.

Q. And you signed it freely and willingly, is that correct?      A. That's right.

Q. Now, you received some money in the mail shortly thereafter, is that correct?

A. Not shortly after, no. It was several weeks after.

Q. In a matter of two weeks, I believe, you received some money in the mail?

A. I don't believe it was that soon. It could have been. I don't believe it was.

Q. Well, you tell us. I don't know.

A. I am not positive, but I think it was several weeks after before we received it.

The Court: Received what?

The Witness: We received our \$100 back that we paid on our hundred-dollar deductible policy.

The Court: Well, I don't understand that. \$100 back?

The Witness: One hundred dollars. Our policy was [30] a hundred dollar deductible policy. We had to pay that.

(Testimony of Oleta Story.)

The Court: Had you already paid that hundred dollars?

The Witness: Yes.

The Court: Before November 29th?

The Witness: Yes. We had to pay that to get our car fixed.

The Court: And who had you paid the hundred dollars to?

The Witness: Raines Chevrolet.

The Court: All right.

Q. (By Mr. Bruno): Then you received this \$100 back in the mail and the check was from your own insurance company, the American Insurance Company, is that correct? A. Yes.

Q. Before that, you received a check for \$330.80, isn't that correct, which they asked you to endorse and send back to them, do you remember that?

A. Yes, because they paid two hundred and some dollars for having the car fixed.

Q. Please answer the question first.

A. Yes.

Q. Isn't that true? A. Yes.

Q. In other words, about two or three weeks after you [31] signed this release, you received a check from Mrs. Dobler's insurance company?

A. No, it was mailed from our insurance company to us.

Q. But the check was that of Mrs. Dobler's insurance company, United Services Automobile Association, isn't that correct?

(Testimony of Oleta Story.)

A. I am not sure. Possibly it was.

Q. Nevertheless, the check was in the sum of \$330.80, is that correct?

A. I don't remember the exact sum.

Q. And you endorsed that check and signed it?

A. Yes.

Q. And you sent that back to your insurance company?

A. Yes.

Q. And then several weeks after that you received another check from your insurance company for \$100?

A. That's right.

The Court: Well, now, how much time was there between this first check for \$330.80 and the second check for \$100.00?

A. I don't know exactly.

The Court: Roughly?

The Witness: Two or three weeks, I would say.

Mr. Bruno: Your Honor, I can give it to you exactly.

The Court: A week or two? [32]

The Witness: Yes, at least.

Mr. Bruno: Would your Honor be interested in the exact dates on that?

The Court: No, no, I just wanted to get the approximate time.

Mr. Bruno: I have a copy I can show to counsel, and I think we can stipulate as to the date she received the \$100 check from the American Insurance Company. I have a duplicate copy of that check.

January 30, 1956, a check was made out by the



(Testimony of Oleta Story.)

American Insurance Company in the sum of \$100 to Thurman B. Story and Oleta Story.

I can get your Honor the other date, too. The check in the amount of \$330.80 was made out on January 12, 1956, to Thurman B. Story and Oleta Story, husband and wife, and American Insurance Company.

Q. (By Mr. Bruno): You repaid that \$100 and cashed that check? A. That's right.

Q. And you have never offered that hundred dollars back to Mrs. Dobler?

A. Yes, it was offered back.

Q. When? A. Before I instituted——

The Court: I don't hear you, Madam. [33]

The Witness: It was offered back when I called this case.

Q. (By Mr. Bruno): To whom?

A. My attorneys offered it back, if I am not mistaken, to her insurance company or to her, I don't know.

Q. Were you present when that offer was made?

A. No, I was not present when the offer was made.

Q. Did you ever see a letter of that type?

A. Yes.

Q. To whom was the letter written?

A. I signed the paper to that effect.

The Court: A little louder, please.

The Witness: I have signed papers to that effect.



(Testimony of Oleta Story.)

Mr. Bruno: Counsel, can you show me a copy of such a document? I have no such document.

Mr. Fernandez: It might be possible that Joe has it—Mr. Lewis, who got the case initially. I believe that whatever was done might have been done orally.

Mr. Bruno: The witness is speaking of a written document, a rescission, apparently. I would like to see it because I have never seen any such document.

Mr. Fernandez: I know you wrote us a letter asking information.

The Court: Counsel, I can't hear all of you having a private conversation. If it is to be of any value to me, [34] I would like to hear it.

Mr. Fernandez: Your Honor, this was handled initially by Mr. Joseph Lewis, and I remember Mr. Bruno wrote us a letter concerning this release, and I believe, whether mistakenly or not, that Mr. Lewis had a conference with you or with Mr. Bruno's insurance company regarding the return of the \$100, but I don't have any note of it in my file concerning the fact that there was any signed statement or any notation that we had sent official offer to return the amount.

Q. (By Mr. Bruno): Mrs. Story, the only thing you ever signed for Mr. Lewis was the complaint starting this law suit, isn't that correct?

A. No, I have signed some more documents. My statements that I gave him.

Q. You never signed any document whatsoever

(Testimony of Oleta Story.)

offering back or tendering back a hundred dollars to me, to the insurance company, or to Jean Dobler, isn't that correct?

A. Yes, I have signed such a statement. There is a statement in my files that I have signed it where I offered a hundred dollars back.

Q. You mean it was in a written document?

A. Yes.

Mr. Bruno: I can state to the Court as an officer of the Court that I have no knowledge of any such document, and I challenge counsel to produce a copy of it. [35]

Mr. Fernandez: You can challenge me, but I don't have it.

Mr. Bruno: You have the whole file there, don't you?

Mr. Fernandez: I do, yes, but—(remainder of statement inaudible to the reporter).

Q. (By Mr. Bruno): Did you ever put the hundred dollars into your attorney's office?

A. No. My attorney was handling it for me and I signed the paper. He showed me the paper and I signed it.

Q. Well, did you ever produce the hundred dollars? Did you ever have a hundred dollars ready for the return?

A. He never asked me for it.

Q. It is true, Mrs. Story, that no one from my office and no one from the United Services Automobile Association, any representative of Mrs. Dobler, Mrs. Dobler herself, or any agent of Mrs. Dobler,

(Testimony of Oleta Story.)

ever communicated with you, talked with you, concerning this subject?      A. No.

Q. Concerning a settlement?      A. No.

Mr. Bruno: Thank you. I have no further questions.

Mr. Fernandez: I have some questions, your Honor. [36]

Cross-Examination

By Mr. Fernandez:

Q. Mrs. Story, do you know approximately how much were the automobile repairs on this car that was damaged?

A. Three hundred and some dollars. The amount of the check that he mentioned.

Q. Now, to what grade did you get in school, Mrs. Story?      A. To the eighth grade.

Q. Now, at or around the time when you signed this agreement—let's put it this way:

Between the time of the accident and the time that you signed the agreement, did you have the advice of any attorney?      A. No.

Q. When you signed this agreement, what was your understanding concerning it?

Mr. Bruno: Objected to, your Honor, upon the ground that it calls for evidence attempting to vary the terms of the written document.

Mr. Fernandez: We are trying to show that the document isn't what it purports to be, that there was a mistake of fact. We are trying to show what

(Testimony of Oleta Story.)

this contract actually is and what the parties understood it was.

The Court: I think you might be entitled to show events that occurred prior to the time of the signing of the document. [37]

Mr. Fernandez: All right.

The Court: Let's see what those are.

Q. (By Mr. Fernandez): Now, you had two conversations with a person from your insurance company? I believe his name was Mr. Brown, is that correct? A. Yes.

Q. Now, at the time you first talked to this person that we will call Mr. Brown, that was at the home of your sister in Sunnyvale, was it?

A. Yes, when he looked at the car.

Q. And you had already called up the Raines Chevrolet people and told them about the accident?

A. Yes.

Q. How many days after the accident was it that you first talked to Mr. Brown?

A. The second day after the accident.

Q. Did you know that he was from the American Insurance Company, your insurance company?

A. No, I didn't know actually. I assumed he was because he was sent out to look at the car.

Q. Now, what did he tell you concerning how much you would have to pay to repair your automobile?

A. He said we would have to pay a hundred dollars.



(Testimony of Oleta Story.)

Mr. Bruno: I object to that on the ground it calls for hearsay testimony, your Honor. [38]

The Court: No. It may be a type of hearsay, but in order to establish her state of mind, I think she is now testifying what would be told to her.

Mr. Bruno: As I understand the ruling, your Honor is allowing the testimony merely to show her state of mind rather than for the truth of the matter?

The Court: That's all.

Mr. Fernandez: Could you repeat the question, please?

(Question and answer read by the reporter.)

Q. (By Mr. Fernandez): What kind of policy of insurance did you have concerning collision repairs to your car? Was it a one hundred dollar deductible policy? A. Yes.

The Court: Now, those things are generally understood, but I think you should spell it out as to what that means, counsel.

Q. (Mr. Fernandez): In other words, Mrs. Story, your insurance covered repairs to your car only for damages over and above a hundred dollars?

A. That's right.

Q. And you had to pay yourself the first hundred dollars? A. Yes.

Q. Now, did you say anything to him when he told you you had to pay this hundred dollars to have your car fixed?

A. Well, I told him that I didn't understand



(Testimony of Oleta Story.)

why we had [39] to pay a hundred dollars when she run into us, and he said, well, her insurance company was an out-of-state insurance company.

The Court: Her what?

The Witness: Her insurance company was an out-of-state insurance company.

Mr. Bruno: Your Honor, I move to strike the last question and the last answer on the further ground that, first of all, it does call for hearsay evidence and your Honor has ruled on that, but I want to object on the further ground that even if it tended to prove the state of mind of the witness at the time she signed this document, this would be an immaterial piece of evidence on the ground that it just tends to show a unilateral state of fact, which it is clear in the law is not an excuse for rescission of a contract or for voidance of the release.

The Court: Overruled.

Mr. Fernandez: Where were we? What was my last question before that objection, please?

(Question and answer read by the reporter.)

Q. (By Mr. Fernandez): Does that complete your answer? A. Yes.

Q. Now, did you have another talk with Mr. Brown again, or this person you believed to be Mr. Brown? A. Yes. [40]

Q. This was a telephone conversation?

A. Yes.

(Testimony of Oleta Story.)

Q. Did you ask him or did he tell you about some papers he was going to send you?

A. Yes.

Q. What did he tell you concerning the papers?

A. Well, he said that——

Mr. Bruno (Interposing): Let the record show the same objection.

The Court: Same ruling.

Q. (By Mr. Fernandez): Go ahead.

A. He said that he was sending us these papers to sign and for us to sign them and send them back to them so that they could receive their money from her insurance company.

Q. What did you say when he told you this concerning what you were signing, the papers he was sending you?      A. Well, I thought——

Mr. Bruno: Objection.

The Witness: I thought it was so they could collect what they had been out——

Mr. Bruno (Interposing): Mrs. Story, please.

Your Honor, I think that is completely incompetent, irrelevant and immaterial, what she thought, because the theory of meeting of minds under contract was drawn out years ago. It is what is definitely stated in the written word that counts. [41]

The Court: Well, we haven't gotten to that yet, have we?

Mr. Bruno: Well, what she thinks I think would be irrelevant, or what she thought.

The Court: Overruled.

(Testimony of Oleta Story.)

Mr. Fernandez: Will you repeat the last question that was answered?

The Court: I think, counsel, if you will go into this telephone conversation a little more in detail, please, that she had with this Mr. Brown, the second conversation?

Mr. Fernandez: Okay.

Q. Now, where were you when you had this telephone conversation with Mr. Brown?

A. Marin Motel.

The Court: At where?

A. At the Marin Motel.

The Court: Marin Motel? A. Yes.

The Court: Was that your permanent place of residence?

A. That is where we were living at the time, yes. My husband was working on a job in Marin County.

The Court: Working where?

A. He was working on a job in Marin County at that time and we were staying at the Marin Motel. [42]

The Court: How long had you been there?

The Witness: We had been there since September, some time in September.

The Court: Of 1955?

The Witness: Yes.

The Court: And what type of employment was your husband on at that time?

The Witness: My husband is an operating engineer. He operates heavy equipment.

The Court: Was this some construction job?

(Testimony of Oleta Story.)

The Witness: Yes, a construction job.

The Court: Near where you were staying?

The Witness: Yes. Saint Vincent School.

The Court: What?

The Witness: It was at Saint Vincent's School.

Q. (By Mr. Fernandez): Did you call Mr. Brown, or did he call you? A. He called me.

Q. Do you recall what the conversation was between you and Mr. Brown concerning repairs to your automobile?

A. No. I remember that he said he was sending us the papers to sign so that they could get their money back that they had been out on our car from her insurance company.

Q. Did he tell you anything about your physical trouble? A. No. [43]

Q. Did he tell you about any medical bills or doctor bills you might incur? A. No.

Q. Or that you had incurred? A. No.

Q. Did he tell you at that time if you signed the papers you would get your hundred dollar deductible back? A. No.

The Court: There was nothing said about your getting this \$100 back in that conversation?

The Witness: No. The only way they ever said that we would get our hundred dollars back was if her insurance company paid all of the damages on the car that we would receive our hundred dollars deductible back, otherwise we wouldn't.

The Court: When was this said to you?

The Witness: Well, they told us that from the



(Testimony of Oleta Story.)

very beginning. When they first looked at the car they told us that.

Q. (By Mr. Fernandez): Now, just to go back for one moment, you bought your car from Raines Chevrolet, is that correct, in Sunnyvale?

A. Yes.

Q. And you also got your insurance from Raines Chevrolet? A. Yes.

Q. And in your dealings with him, your initial dealings on this accident was with Raines Chevrolet Company, is that right, [44] or with the insurance agent of the American Insurance Company?

A. Well, I reported it to the agent at Raines Chevrolet.

Q. Now, when later on, after you had this second conversation with Mr. Brown, you said you received a letter in an envelope in the mail containing the releases that we have here, is that correct?

A. Yes.

Q. Now, what was the return address on the envelope?

A. It was in a Raines Chevrolet envelope.

Q. And after you signed the release, or after you signed the papers that were in that envelope—may I rephrase that question?

After you had signed the paper that was in that envelope, who did you send it back to?

A. Raines Chevrolet.

Q. When you signed the paper on November 29, 1955, what did you think you were signing?

A. I thought it was what Mr. Brown said I was



(Testimony of Oleta Story.)

signing, just for them to get their money back from the other insurance company that they had been out on our car.

Q. And it was the day after you received it that you mailed it back to whom?

A. Raines Chevrolet.

Q. Later on in the mail you got a letter with a check addressed to Thurman Story and Oleta Story and the American [45] Insurance Company, is that correct?

A. Yes, it was mailed from our insurance company.

The Court: What is that? I don't think that question was clear, counsel.

Mr. Fernandez: Well, strike the question. I will repeat it.

Q. After you signed the papers you received a check in the mail, is that correct? A. Yes.

The Court: Didn't it have a letter with it?

The Witness: I don't recall.

The Court: Well, how would you know to send it back if it didn't have a letter with it?

The Witness: You mean the check back?

The Court: Yes.

The Witness: Yes, the check said just to endorse it and send it back. It was made out to my husband and to me and to the American Insurance Company.

The Court: Well, was there a letter with it?

The Witness: Yes, for us to endorse it and give it back.

(Testimony of Oleta Story.)

The Court: Do you have that letter?

The Witness: No, I don't have.

Q. (By Mr. Fernandez): Then you endorsed it and sent it back to whom? [46]

A. To our insurance company, I think.

Q. Then a week or two after that you got a check in the mail, is that correct?

A. Something like that. It was quite a while afterward.

Q. And what was the amount of that check?

A. \$100.

Q. Had you paid the hundred dollars to Raines Chevrolet to repair your car? A. Yes.

Q. Are you still having trouble in your neck?

Mr. Bruno: Objected to on the ground it is irrelevant.

The Court: Well, counsel——

Mr. Fernandez: I am not going into the details on it.

The Court: I think you should. In other words, both of you have cited a number of authorities here. We are not going to do this in two bites. I take it that I will have an opportunity to read the authorities after the matter is over, but I think you should go—If you are finished with your proof about the release now, if you then desire to go into the personal situation, which would be only important if the release issue is determined in your favor.

Mr. Fernandez: Yes.

The Court: If it isn't determined in your [47]

(Testimony of Oleta Story.)

favor, why, it will not be of any importance; but we will do it all at one time and then the Court will have an opportunity to look at these authorities and digest them.

Mr. Bruno: In that respect, your Honor, I am sure what your Honor says is a desirable thing, but that is not what I had in mind when I objected to——

The Court (Interposing): Well, what are we going to do—two trials?

Mr. Bruno: The only difficulty I have is, I have never received a notice of time of trial in this case at all. I never knew the case was on the calendar until Mr. Fernandez and my associate happened to be in court here a week or two ago when the case was called. I don't think Mr. Fernandez knew about it, either. Since they didn't know about it, the case was continued until today.

Then I got busy and I found out in the last two days that Mrs. Dobler, or Miss Dobler, is an Army nurse, was transferred from Hamilton Air Field to Germany. I have no deposition from her. I have never talked to the lady.

And so I want to point that out to the Court. I am at a serious disadvantage in that respect, and at least I would like to consult with her or communicate with her as to her wishes in the matter before I proceed on the question of liability. That is why I thought we could try only the question of the release and see if the rest could be obviated. If [48]

(Testimony of Oleta Story.)

your Honor rules against us in that respect, why, in the meantime, of course, I can communicate with her and be ready in a week or two.

The Court: I think we ought to complete the testimony of this witness upon all issues at this time, and if you then desire to have a continuance for the purpose of producing such testimony on the question of liability as you desire, we will arrange for such a continuance.

Mr. Bruno: All right, your Honor.

The Court: And we will put it over to some other time, but let's finish all the issues with this witness at this time.

Mr. Fernandez: For the record, I might also point out that it was partly through our ignorance of Federal procedure, which might have hurt Mr. Bruno in this respect. Of course, Mr. Gassett and I were in Court on the 23rd and had this matter put over until today. No, I think it was sooner than that. Probably the 18th.

The Court: Well, isn't there a Notice of Motion to set? Wasn't that served on counsel?

Mr. Bruno: Yes, that was received, but we never received any notice of time of trial at all, which is required by the rules, and I just waited patiently knowing it would be set, and I assumed they would tell us when the trial was going to be, but we just happened to be in Court on a criminal matter [49] on the 18th and found out this was set.

That is Rule 14, your Honor—excuse me, Rule 17 of the Rules of the Court.



(Testimony of Oleta Story.)

The Court: It is not in the General Rules.

Mr. Bruno: No, it is Rule 17 of the Northern District. Notice of Time of Trial will be served when the other party wasn't present at the time of setting, which we weren't.

Mr. Fernandez: Of course, you were present at the time of resetting.

The Court: Was anybody present at the time of the setting of this case for trial?

Mr. Bruno: No, we were not.

Mr. Fernandez: Our office was, yes, but the other party wasn't. They were present, however, on the 18th when it was reset over for today. I explained to Judge Harris it was due to our ignorance of the procedure.

The Court: It was originally set for December 18th for trial, is that right?

Mr. Fernandez: The 19th, and on the 18th I was in Court and Mr. Gassett was also in Court at that time, and we requested that the matter be put over until today.

Mr. Bruno: We were in Court on other matters. We just happened to be here.

Mr. Fernandez: I was here on this matter.

Mr. Bruno: But we were not. [50]

The Court: Somebody from your office was here, and on that day received information that it would be tried upon the 30th of December, is that right?

Mr. Bruno: That's right. That is when I got busy.

The Court: All right.



(Testimony of Oleta Story.)

Mr. Fernandez: Well, it is my understanding that we are going to cover the whole witness?

The Court: Yes.

Q. (By Mr. Fernandez): Mrs. Story, what was your occupation at the time of the accident?

A. Housewife.

Q. And how long have you been so employed?

A. How long?

Q. Yes. A. 16 years.

Q. Now, you were married to Mr. Thurman Story, the gentleman over to my left?

A. Yes.

Q. And where were you living at or about the time of this accident?

A. At the Marin Motel.

Q. This was in Marin County? A. Yes.

Q. Now, directing your attention to October 2, 1955, Mrs. Story, were you living at the Marin Motel at that particular [51] time? A. Yes.

Q. Did you and your husband have occasion to leave the Marin Motel for San Francisco on that day? A. Yes.

Q. And what highway were you going to take to get to San Francisco? A. 101.

Q. You were heading for San Francisco?

A. Yes.

Q. And you got onto 101 and drove in which direction? A. South.

Q. Just so that we understand it, Highway 101 generally runs north and south— A. Yes.

Q. —near the vicinity of this accident?

(Testimony of Oleta Story.)

A. Yes.

The Court: May I interrupt you, Mr. Fernandez? The reporter has been going pretty steadily. We will take a short recess.

(Short recess.)

Q. (By Mr. Fernandez): Mrs. Story, where did you go to school? Was it in Oklahoma?

A. In Oklahoma.

Q. When did you come to California for the first time? [52]

A. To live?

Q. Yes. A. In August, 1954.

Q. Where had you lived before that time?

A. In Oklahoma.

Mr. Bruno: That I think is incompetent, irrelevant and immaterial.

The Court: Oh, I think it is shown there now. Let's go on.

Q. (By Mr. Fernandez): Now, we have come to the accident that happened on November 2, 1955.

A. Yes.

Q. Do you recall it happened at the intersection—at the Greenbrae intersection in Marin County?

A. Yes.

Q. That is the intersection of Highway 101 and Sir Francis Drake Street, is that correct?

A. I guess. All I know is that they call it the Greenbrae intersection.

Q. In other words, Highway 101 crosses the street at that point?

A. Yes.

Q. So we understand what we are talking about.

(Testimony of Oleta Story.)

the highway at and near this intersection, Highway 101, runs north and south?      A. Yes. [53]

Q. And you were going where?

A. To San Francisco.

Q. And as you came up this—strike that.

Who were you going with on this particular day?

A. With my husband, and we had two little boys visiting us and we were taking them to the zoo.

Q. Where were you sitting?

A. On the right-hand side in the front.

Q. And your husband, was he driving?

A. Yes.

Q. And the two little boys, where were they?

A. One was between us on the front seat, and the other was in the back seat.

Q. What kind of vehicle were you driving on this day?      A. 1955 Chevrolet.

The Court: You were driving a 1955 Chevrolet?

The Witness: My husband was driving a 1955 Chevrolet.

Mr. Fernandez: My question was erroneous.

Q. Who owned that particular vehicle?

A. My husband and I.

Q. And as you came up to this Greenbrae intersection, did you notice whether there was any traffic signal there?      A. Yes.

Q. What kind of signals? Stop lights, a sign, or what?      A. A light. [54]

Q. As you approached the intersection, say about 300 feet away, do you remember what the

(Testimony of Oleta Story.)

color of the lights were for traffic going southbound on 101?

A. The light turned red, and we stopped.

Q. You stopped where, before the intersection, at the intersection, in the intersection, or where?

A. We were the first car. We were stopped right where you normally stop at a intersection.

Q. Can you describe your stop? Was it sudden, slow, gradual, or what?

A. I would say just about an average stop.

Q. Were there any cars in front of you?

A. Yes.

Q. Were there any cars stopped to your right at the time you came to this stop?

A. Not when we come to the stop, but I think there was one pulled up to the side of us.

Q. What was the color of the light when you came to a stop?           A. Red.

Q. While you were in this position of rest, was your vehicle struck by another car from the rear?

A. Yes.

Q. How long had you been in this position of rest before you were struck?

A. Well, I don't know just how long. A few seconds, though, [55] at least.

The Court: How long?

A. At least a few seconds. I don't know just how long. It could have been a minute, or it could have been less. I don't know just how long it was.

The Court: What do you mean by "a few seconds"? How many seconds is that?



(Testimony of Oleta Story.)

The Witness: Oh, I would say at least 15 to 30 seconds. I don't know, actually. I know that we were at a full stop and was sitting there waiting on the light before she run into the back end of us.

Q. (By Mr. Fernandez): Now, you were in the middle lane, is that correct? A. Yes.

Q. How many lanes were southbound lanes on 101? A. Two, I think, aren't there?

Q. Did you ever see this vehicle that struck you from the rear? A. No.

Q. I should rephrase the question: Did you see it any time before the accident? A. No.

Q. What was your first knowledge that an accident was going to happen? What was the first thing?

A. We didn't have any knowledge of it at all until it [56] happened.

Q. You mean you just felt the impact?

A. That's right.

Q. Was your car pushed any distance as a result of the impact? A. Yes.

Q. Was it pushed forward, to the side?

A. Forward.

Q. How far was it pushed, do you know?

A. Completely across the intersection and on down the highway away.

Q. Do you know how wide the highway is at this point? A. No, I don't.

Q. Would you say it was more than 40 feet, or less than 40 feet?

A. I really don't know.



(Testimony of Oleta Story.)

Mr. Bruno: That is leading and suggestive. She said she didn't know.

The Court: Yes, she says she doesn't know.

Q. (By Mr. Fernandez): What happened to your body immediately after the impact?

A. What happened to my body?

Q. Yes.

A. Well, I went forward. It tore our front feet loose and threw us forward. [57]

Q. Did any part of your body strike any part of the car?

A. The front of my forehead hit the windshield.

Q. Did you feel anything in your body right after the impact insofar as pain or unusual sensation?

A. Yes. There was hurting right at the base of my skull. My neck popped and was hurting right at the base of my skull.

The Court: What?

The Witness: Right at the base of my skull here.

The Court: Well, what happened? You haven't told me that.

The Witness: My neck popped and I had a hurting there.

Q. (By Mr. Fernandez): Was your head pushed forward at all as a result of this impact?

A. Yes.

Q. What happened after your head hit the windshield? A. I went back.

Q. You told us about your neck popping. Was

(Testimony of Oleta Story.)

there anything else in any other part of your body that popped or that you felt some unusual sensation?      A. Nothing that I felt at the time.

Q. After you were pushed across the intersection and got out of the car, did you have a conversation with the driver of the other vehicle?

A. No, I didn't. [58]

Q. Did you see the other people?

A. Yes, I saw them.

Q. Did you notice the damage to the—strike that.

Did you see the other car that hit you?

A. Yes, I saw it.

Q. Where was the other car after you had gotten out of your vehicle? Where was it sitting?

A. I really couldn't tell you how far behind our car. It was behind our car, but I don't know just the distance.

Q. Was it in the intersection, to the south of the intersection, or to the north of the intersection? Or just where in general?

A. I don't remember just where it was.

Q. Did you see what the damage was to this other vehicle at the time you got out of your car?

A. Not completely. I did notice that the front——

The Court: Please keep your voice up.

The Witness: I did notice that the front end of the car was smashed in quite a lot.

Q. (By Mr. Fernandez): Was it generally in the front end, though?      A. Yes.

(Testimony of Oleta Story.)

Q. Did you notice where the damage was to your car?

A. It was to the back end of our car.

Q. What about the seats? Did it disturb the seats? [59]

A. Yes, they were torn completely loose and the steering wheel was broken in two places.

Q. Was there any other damage to the car?

A. The controls on the heater, the heater control was all bent.

Q. Was there any damage to the front end of the car?      A. No, no damage to the front end.

Q. Was there any damage to the windshield that you saw?      A. No.

Q. After you got out of your car, did you feel any unusual sensation in any part of your body?

A. Just that hurting at the base of my skull, and my head started hurting, and I was extremely nervous.

Q. What did you do after the accident? Did you go home or go on to San Francisco?

A. We went on to San Francisco, but we didn't even go into the zoo. We turned around and——

The Court: You what?

The Witness: We didn't even go into the zoo. We turned around and went home because I was feeling so bad and so nervous.

Q. (By Mr. Fernandez): You were going to the zoo in San Francisco, I take it?      A. Yes.

Q. Why did you go home, now? [60]

A. I was feeling bad. I had such a headache and

(Testimony of Oleta Story.)

I was nervous, so we turned around and went home.

Q. Did you see a doctor—strike that.

When was the first time you saw a doctor for your troubles?

A. I believe the first time that I went to a doctor was in September of 1956. I saw a doctor in December, on Christmas Day, for a headache at the San Rafael Hospital.

The Court: For what?

The Witness: For a headache.

The Court: You saw a doctor in December of 1955?

The Witness: Oh, 1955, yes.

The Court: For a headache, you say?

The Witness: Yes.

The Court: Up to that time you hadn't seen any doctor at all?

The Witness: No.

The Court: Well, between the date of the accident, October 2nd, up till Christmas, what had been your condition at that time?

The Witness: Well, it would come and go. I would have severe headaches, and then they would go away.

The Court: At any time, were you confined to your bed by reason of this accident?

The Witness: With severe headaches I have been off [61] and on, yes.

The Court: Well, I am speaking of the time between October and December. Were you confined to your bed the next day after the accident?



(Testimony of Oleta Story.)

The Witness: Yes, all day.

The Court: What?

The Witness: All day the next day after the accident.

The Court: Why were you in bed then?

The Witness: Well, I was sore all over, couldn't hardly——

The Court: And you stayed in bed that one day?

The Witness: Yes.

The Court: Thereafter, were you confined to your bed at any time by reason of the accident?

The Witness: Only when I had severe headaches.

The Court: And where were these headaches?

The Witness: They start in my neck and go to the front of my head.

The Court: But you didn't go to see a doctor about this condition?

The Witness: No. The first time I saw a doctor was December 25th.

Q. (By Mr. Fernandez): 1955?

A. Yes. [62]

The Court: Where did you see a doctor then? At his office?

The Witness: At the hospital at San Rafael.

The Court: How did you happen to go there on that day?

The Witness: My husband took me. I had such a severe headache, my husband took me.

The Court: Did you get any treatment there at that time?



(Testimony of Oleta Story.)

The Witness: Yes, he gave me a shot and gave me some kind of a tablet to take for my head.

The Court: He gave you a shot where?

The Witness: In my arm.

The Court: Well, what was that for? For pain?

The Witness: For pain.

The Court: And you got some tablets? What were they?

The Witness: For pain.

The Court: Like aspirin, or——

The Witness: No, they were prescriptive.

The Court: Codeine? You don't know what?

The Witness: I don't know what it was.

The Court: All right, did you go to a doctor at any time after December 25, 1955?

The Witness: Not until—I think it was in August [63] or September. I believe it was in September of 1956, that I went.

The Court: September, 1956?

The Witness: Yes.

The Court: How did you happen to go to the doctor at that time?

The Witness: Well, I had been having pain all the time, and it was getting worse, and it had gone down into my right arm and I was losing the use of my right arm, and my sister kept on at me to go to the doctor and I finally went.

The Court: What doctor was that?

The Witness: Dr. Besson at Sunnyvale.

The Court: Were you living there in Sunnyvale at that time?

(Testimony of Oleta Story.)

The Witness: Yes.

The Court: After the accident, how long did you live at the Marin Motel before you moved away?

The Witness: It was the last part of January or first part of February that we went back to Sunnyvale.

The Court: All right. Now, when you saw this doctor in September, 1956, did you get any treatment at that time?

The Witness: Yes.

The Court: What?

The Witness: He gave me some kind of heat treatments. [64]

The Court: Heat treatments?

The Witness: Yes, with a lamp and what he called deep sound treatments.

The Court: Directed to what portion of your body?

The Witness: To my arm and shoulder here. The right arm and shoulder.

The Court: What kind of a doctor was this man?

The Witness: He is just a medical doctor.

The Court: A general practitioner? He wasn't a specialist?

The Witness: No, he wasn't a specialist.

The Court: And how did you get this treatment, at his office or at your home?

The Witness: At his office.

The Court: How many treatments did you get?

The Witness: Well, I don't know for sure. I think I taken five or six treatments from him off and on. He wanted me to take treatments every day

(Testimony of Oleta Story.)

but I couldn't get in every day to take treatments.

The Court: All right, go ahead, counsel.

Q. (By Mr. Fernandez): Now, between October 2, 1955, and December 25, 1955, where was your trouble in your body?

A. In my neck and head.

Q. Were there any other parts of your body bothering you?

A. Between December and October? [65]

Q. Between October 2, 1955, to December.

A. No.

Q. Now, this trouble you had in your neck and head, was it always with you, or was it just with you part of the time?

A. No, it would just come and go part of the time.

Q. Do you know how often it would come during a month between those two periods I mentioned?

A. Oh, I would say every week or at least ten days.

Q. And when you had this headache and the trouble in your head and neck, what did you do?

A. Well, I would go to bed and stay in bed, and I would take aspirin or D.C. powders, anything that I thought might relieve it.

Q. And between Christmas of 1955 and up to September of 1956 did you have any other trouble in any other parts of your body other than those you have just mentioned?

A. Yes, it went down into my shoulder and arm.

Q. Which shoulder are you referring to?

A. The right shoulder.

(Testimony of Oleta Story.)

Q. Can you indicate to the Court the direction that this trouble took?

A. It goes down into my neck and into my right shoulder and upper part of my right arm.

Q. And was this pain constant or just part of the time? A. Yes, it was constant. [66]

Q. Can you describe this trouble that went into your right arm?

A. Well, I really don't know how to describe it. You mean the pain?

Q. Yes.

A. It hurts just like my neck does, but it is in my arm. The same pain as the neck. It is sore and—I can't describe the pain. It is a kind of a sharp pain, especially when I move my arm or if I move my neck it is a sharp pain.

Q. Between Christmas, 1955, until December, 1956, did this pain in your arm and shoulder get better, stay the same, or get worse?

A. It got worse.

Q. What about the trouble in your neck and your headaches, did that get better, stay the same, or get worse? A. It's gotten worse, too.

Q. This pain in your right arm, did it have any effect upon your ability to grip? A. Yes.

Q. What effect did it have?

A. Well, I couldn't hold on to things. I couldn't grip things like I could before.

Q. What about your ability to lift?

A. No, I couldn't lift anything. It hurt.

The Court: What? [67]



(Testimony of Oleta Story.)

The Witness: It hurt my arm to lift anything.

Q. (By Mr. Fernandez): How about your housework during this period? Could you do all your normal activities? A. No.

Q. What are some of the things you couldn't do?

A. Well, I can't do my sweeping or mopping, I can't do my washing or ironing.

Q. This is true also today, is it? A. Yes.

The Court: Well, you do some of that, don't you?

The Witness: No, I don't.

The Court: What?

The Witness: No, I don't. I happen to have some good friends and some sisters-in-law, and neighbors, that is good to me and helps me out or I wouldn't have anything done. I can't do my ironing nor my washing.

The Court: Do you mean by that that you don't do any of them at all, or that when you do it causes you some pain and you are not able to continue?

The Witness: Well, I just don't do it because I haven't been able to and I know that it causes pain and makes it worse, so I just don't do it.

Q. (By Mr. Fernandez): After September of 1956, did you see anybody else for your troubles?

A. After what? [68]

Q. After September of 1956—wait a minute. Just strike the question.

Who did you see? What was the name of the doctor you saw in September, 1956?

A. Dr. Besson, in Sunnyvale.



(Testimony of Oleta Story.)

Q. After you saw Dr. Besson, did you see any other doctors?

A. I did see a Dr. Goddard in October of this year.

Q. Where is Dr. Goddard's office, do you know?

The Court: How do you spell that?

The Witness: G-o-d-d-a-r-d, I think.

Q. (By Mr. Fernandez): How did you happen to see Dr. Goddard?

A. Actually, my husband called Dr. Zarka because his office was close to where we lived. I couldn't move. He had to raise my neck up. I couldn't even raise my head up. I woke up that way. He called Dr. Zarka and Dr. Zarka wanted him to bring me to the hospital, and he took me over there and Dr. Zarka turned me over to Dr. Goddard.

Q. Can you tell us a little bit about this being unable to move situation?

A. Well, I just couldn't raise my head up, it was so painful to move. Dr. Goddard said it was muscle spasm.

Q. Had you ever had this trouble before?

A. Well, yes, but not that bad.

Q. Was it your whole body? [69]

A. No, just the upper part of my body.

Q. Now, you say you went to O'Connor's Hospital? A. Yes.

Q. That is in San Jose, also? A. Yes.

Q. How long were you in O'Connor's?

A. Just for X-rays. They didn't enter me. I was

(Testimony of Oleta Story.)

an outpatient. They just—well, he examined me and had X-rays taken.

Q. Where did you go after that? Back home?

A. Back home.

Q. Now, did you get any treatment from Dr. Goddard? A. Yes.

Q. What was that treatment?

A. He gave me medicine and he sent me to some physiotherapist and they give me oscillating traction.

The Court: Oscillating what?

The Witness: Oscillating traction and heat treatments and deep sound treatments.

Q. (By Mr. Fernandez): What is the name of these people who gave you this traction and deep sound treatment? A. Sherman and Horn.

Q. Were they physiotherapists? A. Yes.

Q. Where are they located? [70]

A. In San Jose.

Q. How long have you had treatments from them?

A. Well, since October. I was supposed to take a treatment every day, but I haven't been able to take them every day. I have taken several treatments from them. I don't know just how many.

Q. Where did they give you this treatment, what parts of your body?

A. Across my shoulders and back.

Q. Now, directing your attention to this general period of time of December and November, can you tell us, describe to us, what is the condition of your

(Testimony of Oleta Story.)

neck at the present time with reference to your trouble?

A. Well, it is still sore and hurts to move it.

The Court: What?

The Witness: It's still sore and hurts to turn it.

Q. (By Mr. Fernandez): Can you tell us what happens when you move your neck to the left or right?

A. It hurts to move it.

Q. Do you notice that you can't move your neck all the way that you could before the accident?

A. Yes, I can't move it as far.

Q. Now, what about movements up and down?

A. It hurts either way.

Q. Can you just show us where it hurts when it hurts? [71]

A. You mean turn my head to where it hurts?

Q. Just indicate for the record.

A. Well, it hurts right back at the base of my neck and down my shoulders.

Q. Do you have any trouble up on the top?

A. Only when I have severe headaches.

Q. That would be the base of the skull I was pointing to?

A. Yes.

Q. Do you still have these headaches?

A. Yes.

Q. And where are they usually?

A. They go from my neck back there and up to the front of my head.

Q. Now, how often do you get these headaches during a month? Say in the last two months, how often have you had them?

(Testimony of Oleta Story.)

A. Well, I have headaches nearly every day. As far as headaches, I am hardly ever without a headache; but those severe headaches, I have three or four of them a month.

Q. How often do you get pain in your neck?

A. I have pain in my neck all the time when I move it.

Q. Are you trying to say you are never free from pain in your neck at the present time?

A. That's right. I am never free from pain.

Q. What about your right shoulder and your arm? Can you tell us about your trouble there now? [72]

A. Well, my arm is, I can move my arm more freely now than I could, but it's gone back up into my shoulder more.

Q. By "shoulder," which part do you mean?

A. I mean across the back of my shoulder here (indicating).

Q. Indicating the top back of your shoulder?

A. Yes.

Q. Do you mean both shoulders? A. Yes.

Q. You referred earlier in your testimony to the trouble in your arm causing you to have trouble in gripping and lifting. Is that true today or is that different?

A. Well, it's true. I can lift better and my grip is better than it was, but it isn't as good as it was before the accident.

Q. Does weather have any effect on your neck,



(Testimony of Oleta Story.)

your shoulder or arm? Does weather have any effect on your body at all?

A. Well, my doctors seem to think so, yes.

Q. Do you notice any effect?

A. Well, I have those severe headaches so much that I didn't notice if it was weather or anything.

Q. Is there any particular activity that you do during an ordinary day that gives you more trouble in these parts of your body?

A. No, because I don't do hardly anything. My doctor told me not to. [73]

Q. How about sleeping? What effect does this trouble have on your sleeping?

A. It hurts when I sleep.

Q. What happens?

A. Well, it's just the same pain. Some nights I don't sleep hardly at all.

Q. Has the trouble in your body, in your estimation, continued since the time of the accident up to the present time—has it gotten steadily better, steadily worse, or stayed the same?

A. Well, I think it is worse than it was.

Q. What trouble did you have in your neck—what trouble, if any, did you have in your neck prior to this accident?

A. I never did have any trouble with my neck.

Q. What trouble, if any, did you have in your shoulder prior to this accident?

A. I never did have any trouble with my shoulders.

Q. How high can you lift your right arm?

(Testimony of Oleta Story.)

A. Well, I can lift it completely up, but it hurts.

Q. Do you notice that in gripping things with your right arm you drop things from time to time?

A. I have, yes.

Q. Do you know why this is?

A. Well, I just can't hold onto it, and my grip seems to give way, and the pain in my arm, it hurts my arm. [74]

Mr. Fernandez: Your witness.

The Court: Shall we resume at 1:30, counsel?

Mr. Bruno: Fine with me, Judge.

The Court: All right, we'll take a recess until that time.

(Thereupon, this Court was recessed until the hour of 1:30 p.m., same date.) [75]

December 30, 1957—1:30 P.M.

Mr. Fernandez: I just have a couple of questions of my witness, if your Honor please.

(The witness Oleta Story resumed the stand.)

Cross-Examination

(Continued)

By Mr. Fernandez:

Your Honor might be able to follow, at least initially, by question easier than looking at the answers to interrogatories propounded by the defendant, Jean Dobler.

Q. Mrs. Story, do you recall that Mr. Bruno asked you whether you had offered to return the hundred dollars, signed a paper offering to return the hundred dollars to Miss Dobler? A. Yes.

(Testimony of Oleta Story.)

Q. Did you have reference to the paper you signed which are the answers to interrogatories propounded by the defendant, Jean Dobler?

A. Yes.

Q. And you also had reference to the answer to question 8-N, is that right?           A. Yes.

Mr. Fernandez: I just wanted to clear that matter up, your Honor, as to what she meant when she said she had signed some papers.

Q. Then, one further question. Do you have some pills in [76] your purse now?           A. Yes.

Q. What is that for?

A. They are pain pills.

Q. Do you know what they are?

A. No, I don't know what they are. They are a prescription my doctor give me.

Q. How often do you take these pills?

A. I take them every day.

Q. Do you have any pills for sleeping?

A. Yes.

Q. How often do you take those?

A. Three or four times a week.

Mr. Fernandez: No further questions.

### Redirect Examination

By Mr. Bruno:

Q. Mrs. Story, as I understand your testimony, you didn't go to any doctor and seek any medical advice after the accident until December, 1955?

A. That's right.

Q. And at that time you had one visit with the

(Testimony of Oleta Story.)

doctor and that was all?           A. That's right.

Q. And you then did not seek medical advice again until September of 1956, almost a year after the accident, is that [77] correct?

A. No, I didn't have the money to go to a doctor.

Q. Would you answer the question please?

Mr. Bruno: And I move to strike the answer the witness gave.

The Court: It may go out.

Q. (By Mr. Bruno): Would you answer the question, please?           A. No.

Q. And in September of 1956, you went to the doctor, I believe, either two or three times for some heat treatments?

A. I think it was four or five times that I went to him.

Q. Then you didn't go again until October, at which time you went two or three times again?

A. Yes.

Q. And then you never went to the doctor again until March, 1957?           A. Yes.

Q. At which time you went to the doctor once, did you?           A. Yes.

Q. And from that time on you never went to the doctor, I believe you said, until October, 1957, is that correct?           A. That's right.

Q. At that time you were X-rayed and were given some pills—X-rayed at O'Connor Hospital, given some pills and went home? [78]           A. Yes.

Q. During this time since October, 1955, Mrs.



(Testimony of Oleta Story.)

Story, is it your testimony that you never received any injuries during that time?

A. No, I never received any.

Q. Never twisted your neck or lifted something too heavy at home in your housework? A. No.

Q. There was no incident of any kind which would bring on these incidents which were some months apart?

A. No. I had the incidents, but I just couldn't afford to go to the doctor until they were so severe I had to.

Q. Now, as I understand your testimony also, November 29, 1955, is when you signed this release?

A. I beg your pardon?

Q. November 29, 1955, is when you signed this release?

A. That is when I signed the paper, yes.

Q. And prior to that time you said you had some conversation with an agent from Brown Brothers Adjusters who was agent for the American Insurance Company, your insurance company?

A. That is what I thought he was for, yes.

Q. And he told you, did he, he was going to send you a release?

A. When I talked to him on the telephone?

Q. Yes. [79]

A. Yes. He didn't say a release. He said he was going to send some papers to sign.

Q. He didn't say "release"?

A. No. He said so the American Insurance Company——

(Testimony of Oleta Story.)

The Court: A little louder, please.

The Witness: He said so the American Insurance Company could get their money back for having our car fixed.

Q. (By Mr. Bruno): Is it your testimony he said nothing about the return of the \$100 to you?

A. He didn't promise our hundred dollars to us at all.

Q. Did he say anything about it?

A. The only thing they ever said was, if her insurance company paid all of the bills we would receive our hundred dollars back, and if they didn't we wouldn't.

Q. Well, didn't he tell you her company was paying the entire bill for it before you received this release of claim?      A. No.

Q. Didn't you even glance at this release of claim before you signed?

A. Oh, yes, I glanced at it when I took it out of the envelope, but I didn't read it.

Q. You knew how much the repair bill was on your car at that time, isn't that correct?

A. I knew it was three hundred and some dollars.

Q. And at that time you knew you were paying Raines some [80] \$25 a month on the \$100 deductible you owed them, isn't that right?

A. That's right.

Q. So when you received this release you noticed it was in the full amount of the repair bill, isn't that correct?

(Testimony of Oleta Story.)

A. On the papers? No, I didn't notice the amount on the paper.

Q. And when you took this paper to your husband, did you discuss the matter with your husband when you asked him to sign it?

A. No, I didn't.

Q. Did your husband read the document?

A. No, I don't believe he did.

Q. You mean you didn't even exchange one word directly concerning the nature of this document that you brought him to sign?

A. The only thing is, I told him we had to go to a notary and sign these papers for our money.

Q. And what the paper was you never discussed?

A. No.

Q. And he never discussed it with you?

A. No.

Q. And neither of you read it? A. No.

Q. You had the paper in your possession one day, then, is [81] that correct?

A. That is correct.

Q. Now, as I understand, you have read and understand the paper? You read it in Court?

A. Yes, I read it.

Q. And your education and knowledge of the English language is sufficient so that you understood what it said?

A. Yes, this morning when I read it in Court.

Q. You read it even before that? You read it in your attorney's office, didn't you?

A. No, I haven't ever read it completely.

(Testimony of Oleta Story.)

Q. Your attorney never showed it to you?

A. He showed it to me, yes, to verify my signature.

Q. And at the time you signed these papers, you were at that time claiming for personal injuries, isn't that correct?

A. I don't understand what you mean.

Q. At the time you signed a release on November 29, 1955, you knew at that time you had sustained some sprain of the neck?

A. Yes, I knew it.

Q. And you described that sprain of the neck to your agent who filled out the accident report?

A. No, I didn't describe it. I said I had a headache and was extremely nervous.

Q. And you told him your neck hurt?

A. That was the second day after the [82] accident.

Q. And you told him your neck hurt?

A. No, I don't think I did. I told him my neck popped and that my head hurt.

Q. So the man from Brown Brothers, as I understand your testimony, told you on the telephone you had to sign this paper so that the insurance company could get their money back?

A. That's right.

Q. And that is all you understood when you signed the paper?      A. That's right.

Q. You didn't think you were getting anything out of it?



(Testimony of Oleta Story.)

A. That's right. I didn't think I was getting anything.

Q. And he didn't tell you you were getting anything out of it?      A. No.

Q. It is true that when you took your car out of the shop—which was October 15, 1955?

A. I don't know the exact date.

Q. Does that sound about right?      A. About.

Q. You paid \$25 on account, on account of the repair bill?      A. That's right.

Q. And the balance—well, another \$25 you paid November 6, 1955, is that correct?

A. I don't know just what date. [83]

Q. Do you remember that the balance of \$50 was paid on February 4, 1956?

A. I don't remember just the date that I paid it. I know I paid them.

Q. Mrs. Story, let me ask you, you knew all along from the time of November 29, 1955, you knew all along that you had signed a release for property damage claim and personal injury claim against Jean Dobler and any claims you had against her, did you not?      A. No.

Q. And why is it, ma'am, you waited until about one day before the statute of limitations ran on this case before you filed your complaint in Court?

Mr. Fernandez: I want to object to that. I think it calls for a legal conclusion.

The Court: I will permit her to answer.

Q. (By Mr. Bruno): Why is it you waited almost a year?

(Testimony of Oleta Story.)

A. Because I hadn't been to a doctor, and I went to a doctor and he told me the extent of my injury couldn't be determined, that these type of injuries keep coming back like mine had been doing, so after I saw him, I talked to an attorney.

Q. When was that, ma'am?

A. I don't remember the exact date. It was sometime in September, I believe, of 1956.

Q. So you did nothing about the case from October 2, 1955, [84] until sometime in September, 1956?

A. That's right.

Q. And the reason you didn't is because you knew you had signed a release of all claims, isn't that correct?

A. No. The reason I didn't was because I didn't have the money to go to the doctor, and I went on with my suffering as much as I could.

Q. Well, what does that have to do with going to see a lawyer and filing a law suit against Mrs. Dobler?

A. Well, I didn't even think about going to a lawyer until my doctor told me the pain would keep coming back.

Q. And you filed your complaint——

Mr. Bruno: May we have the stipulation that the complaint was filed September 27, 1956?

I have no further questions.

Mr. Fernandez: I have none, your Honor.

The Court: All right, you may step down.

(Witness excused.)

Mr. Bruno: Your Honor, both counsel are of the opinion that your Honor decided to hear all of the testimony from this witness and that the matter could then be put over for a decision.

The Court: No, that isn't what I said. It wasn't my thought, anyway, if I did say it.

Mr. Bruno: Then we misunderstood. [85]

The Court: I think whatever case the plaintiff has to put in, he should put in.

Mr. Fernandez: Oh, I am sorry, your Honor. Before we left at noon I talked to the bailiff and counsel, and said, "Do you think His Honor meant he just wanted Mrs. Story's testimony?"

The Court: I didn't say that. There isn't anything in the record that indicates that. I expected the plaintiff to go ahead with his case.

Mr. Fernandez: I am sorry, your Honor, because otherwise I would have called up the doctors.

The Court: This is the day the case is set for trial, and that is what we are here for, and I am giving you the time for it and I am ready to hear it. That's why we are here.

Mr. Fernandez: I am sorry. We have to call the doctors. I would have done so before I left.

The Court: Did I tell you not to do it? Who told you not to do it? Certainly my bailiff never told you not to bring witnesses.

Mr. Fernandez: I talked to Mr. Bruno and said I wanted to see the Judge to be sure. I asked the bailiff if I could approach the bench through the door, and then said it was my understanding all the Judge wanted was for Mrs. Story's testimony to be

put on today, and I believe Mr. Bruno concurred, and the bailiff concurred, or I would have called Dr. Goddard [86] and Dr. Besson.

Mr. Bruno: I don't think you could get them on that short notice. What you say is correct.

Mr. Fernandez: That was my understanding.

The Court: Well, you didn't get it from me, counsel, any such understanding. I am here ready to hear the case, and if I don't hear it today, I don't know when I will have time to hear it because I go into some other proposition. This is the day that I am ready to hear it.

Mr. Fernandez: We can try to get the doctors.

The Court: Where are the doctors? In San Jose?

Mr. Fernandez: They are in San Jose. Dr. Besson is in Sunnyvale. That is the first doctor I intended to call, and I would have——

The Court: Why didn't you?

Mr. Fernandez: Well, I asked the bailiff and Mr. Bruno what their understanding was of what the judge wanted, which I thought was the testimony of Mrs. Story, because otherwise Mr. Bruno would have wanted to put on his case and he wasn't prepared.

The Court: I told you, Mr. Fernandez—Now, there isn't any doubt about it—I said the plaintiff could finish their case and at that time if you wanted a continuance for the purpose of putting on a defense, I would grant it, but I wanted the plaintiff to put on their case. Anything that you want to [87] put on, I am here ready to hear it.

Mr. Fernandez: We have Mr. Story here.



The Court: Well, put on whatever you have to put on. Have you got the medical report in writing?

Mr. Fernandez: Yes, we have the medical report in writing.

The Court: Have you shown that to counsel?

Mr. Fernandez: I am sorry, I will show it to counsel now, your Honor.

### THURMAN B. STORY

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Your full name, please?

The Witness: Thurman B. Story.

### Direct Examination

By Mr. Fernandez:

Q. Where do you reside at the present time, Mr. Story? A. 962 Moorpark, San Jose.

Q. Do you recall the date October 2, 1955?

A. Yes.

Q. Where were you residing at that time?

A. The Marin Motel, in Marin County, in San Rafael.

Q. What was your occupation at that time?

A. Operating engineer.

Q. How long had you been so employed? [88]

A. As an operating engineer?

Q. Yes. A. 25 years.

Q. Do you recall that you were traveling on Highway 101 headed toward San Francisco at or

(Testimony of Thurman B. Story.)

near the time of the accident that we are concerned with today?      A. That is right.

Q. Do you also recall that the accident happened in the intersection of Highway 101 and Sir Francis Drake Street, normally referred to as the Greenbrae intersection?      A. Yes, I do.

Q. What kind of vehicle were you driving that day?

A. A new 1955 Chevrolet, two-door sedan.

Q. Who was with you?

A. My wife and a small nine-year-old boy in the front seat and a 15-year-old boy that was in the back seat.

Q. Did you come up to a stop sign at the Greenbrae intersection?      A. A stop light.

Q. When you were, say, 300 feet to the north of the intersection, do you remember the color of the light at that time?

A. Approximately 300 feet, it was green, then it changed to red.

Q. And you came to a stop where? In the intersection?

A. Right at the intersection at the crosswalk line. [89]

Q. What lane were you in at that time?

A. I was in the middle lane.

Q. When you came to a stop, what was the color of the light?      A. It was red.

Q. Do you recall that your vehicle was struck in the rear sometime after you had come to a stop?

A. Yes.

(Testimony of Thurman B. Story.)

Q. How long were you stopped before you were struck?

A. It would be hard to determine, but approximately 15 seconds.

Q. Did you see the vehicle that struck you at any time before your automobile was struck?

A. I did not.

Q. Can you describe your stop to us? Was it sudden, gradual?      A. Gradual, normal stop.

Q. Now, what was the first indication to you that a vehicle was going to hit you?

A. The impact.

Q. You didn't hear any scraping of brakes or anything?      A. No.

Q. What happened to your vehicle after it was struck?

A. Well, we was knocked across the intersection, which is about 50 feet wide. We was knocked clear across it, and the [90] Highway Patrolman taped it and we was knocked 46 feet across the intersection.

Q. After the impact did you have occasion to get out of your vehicle?      A. I did.

Q. And did you have occasion to see the damage to the automobile that hit you?      A. I did.

Q. What was the damage to that vehicle?

A. The front end was completely demolished.

Q. Did you have occasion to see the damage to your vehicle?      A. I did.

Q. And what was the damage there and where?

A. Well, the back trunk compartment was smashed in and upward, and the back bumper was

(Testimony of Thurman B. Story.)

broken, and the frame was bent on the car. I crawled underneath and noticed that because my brakes couldn't brake at that time. After I had driven down to a filling station and got it on the hoist, we had to release the brakes.

Q. Did you have a conversation with the driver of the vehicle that hit you?

A. No, not—just between her and I and the investigating officer, a patrolman.

Q. It was a woman who was driving the car, is that right?

A. Yes, sir. [91]

Q. Was her name Jean Dobler?

A. That is what she said her name was, yes, sir.

Q. Do you recall what the substance of this conversation was between you, Miss Dobler, and the police officer concerning the accident?

A. I asked the lady, didn't she see me stop there, and she said, "No, I didn't." I said, "What reason do you have for running in and tearing my new car up?" And she said, "I am terribly sorry about your car," and that it was all her fault. She had two Navy pilots with her.

The Court: Two what?

The Witness: Two Navy pilots from Hamilton Air Base.

The Court: I still didn't hear.

The Witness: Navy pilots. And I remember the officer kidding one of the pilots about his shirt being burnt.

Mr. Bruno: That is not responsive to anything. I move to strike that.



(Testimony of Thurman B. Story.)

The Witness (Continuing): That's about all. And I told the officer since it was her fault I would like for it to be fixed so there wouldn't be any question about the repairing of my car.

Q. (By Mr. Fernandez): All right, just the conversation between you and Miss Dobler. Does this have reference to the conversation between you and Miss Dobler? [92]

A. That's the conversation we had.

Q. Now, then, can you tell me the condition of the weather at the time of the accident? What was the weather like?

A. It was fair.

Q. What about visibility?

A. It was clear.

Q. Were the roads wet or dry?

A. Dry.

The Court: This was a Sunday, was it?

The Witness: Yes, sir.

Q. (By Mr. Fernandez): Can you tell us what the traffic was like as you came up to the intersection?

A. Very light.

Q. Do you recall what the traffic had been like from the time you left the motel and got onto Highway 101 up until the time of the accident?

A. It was very light.

The Court: It was light, you say?

The Witness: Light traffic. Not much traffic 9:00 o'clock Sunday morning.

The Court: 9:00 o'clock Sunday morning?

The Witness: Yes.

Q. (By Mr. Fernandez): Is that about the time the accident happened?

(Testimony of Thurman B. Story.)

A. Approximately, yes. [93]

Q. Did you continue your trip up to San Francisco after that? A. Yes.

Q. And did you go to your intended destination?

A. No. No, we returned home.

Q. Why was that?

A. Well, my wife was complaining about a headache and extreme nervousness. She wanted to return home.

Q. You have heard your wife testify about conversation that she had with her insurance company. Did you have any conversations with your insurance company concerning the accident? A. No.

Q. Would it be an accurate statement to say your wife had all the dealings with your insurance company? A. That's right. She taken care of all of it.

Q. Your wife—strike that question.

What do you recall about receiving some papers in the mail on or about November 29, 1955?

A. I don't recall the specific date that my wife brought some papers out on the job and told me I would have to sign them.

The Court: Now, he says he didn't have anything to do with it, his wife handled it.

Mr. Fernandez: Yes. I was just asking what happened on November 29th as far as he was concerned. [94]

Q. Have you seen these papers (handing document to the witness)? This release? Just look at the signature. There is no question about the fact that that is your signature?

(Testimony of Thurman B. Story.)

A. That is my signature.

Q. Okay. Now, since the time of the accident and up to the present time, what have you noticed concerning your wife and her physical condition?

A. She hasn't been able to do her work, her housework, and frequently she was in pain, and she has to lie down, oh, I would say three or four times a week, and the doctors has got her on a pain tablet that is evidently pretty strong. I don't know. They seem to ease her down and collect her. That's just about it.

Q. Have you noticed that her complaints are getting steadily more or steadily less, or is that about the same since about the time of this accident?

A. I believe it's about the same. I don't believe it's any worse, and I know it isn't any better.

Mr. Fernandez: You may cross-examine.

### Cross-Examination

By Mr. Bruno:

Q. Mr. Story, did you have any conversations at all, sir, with your insurance company, or a representative of your insurance company concerning this accident or damage to your car? [95]

A. No, sir, I didn't.

Q. Did you sign any report to the insurance company concerning the accident?

A. None other than that report you have right there, whatever—release.

Q. And you had no conversation with any representative of the insurance carrier for the other

(Testimony of Thurman B. Story.)

driver, Jean Dobler?           A. No, sir.

Q. And you had no conversation, either personally or by telephone, with any agent or representative of Jean Dobler or the insurance company?

A. No, sir, I didn't.

Q. When Mrs. Story brought this release for you to sign, did you look at it?

A. I didn't take time to, no. I didn't specifically read it. She just outlined about what it was and intimated it was some papers releasing our insurance so we could get our car bill paid, and I was busy and I jumped in the car with her and ran down there and signed the thing and back on the job.

Q. You can read, can you not?

A. Yes, sir.

Q. And you say that you had to sign that, it was your understanding you had to sign this to get your car released?

A. She told me it was our insurance, that they was wanting to have the release signed over to them so that they could get [96] this out-of-state insurance company to pay off.

Q. You already had your car when you signed this release?

A. I believe we did. I don't recall.

Q. You got it on October 15, 1956?

A. I think so. I believe we did, yes.

Q. About two weeks after the accident?

A. I don't remember the time.

Q. And you already had made some payments on your deductible? You had paid \$25 at the time you



(Testimony of Thurman B. Story.)

got the car and \$25 on November 6, 1955, isn't that right?

A. I believe she give the check. She made the payment.

Q. You still owed \$50 which you paid in February, 1956?

A. I have some recollection of that, yes.

Q. So that you had the car and the insurance company had paid off their portion of the property damage, and you were paying off your portion of the bill in installments, isn't that correct, at the time you signed this release on November 29, 1955? That was the situation, isn't that correct?

A. Now, you will have to rephrase it. I am sorry, I didn't follow you.

The Court: Well, there isn't any question about it. Mrs. Story testified that that was the situation.

Mr. Bruno: I have no further questions, your Honor. Oh, let me ask you one last question:

Q. You knew that Mrs. Story had signed the release for all [97] personal injuries, isn't that right?

A. No, I didn't know that she had signed a release for all personal injuries. I thought she was signing that release for what she told me she was signing it for. I had no reason to not believe her.

Q. You had an opportunity to read this, didn't you?

A. If I had doubted my wife and had the time, yes.

Q. Did you have an opportunity to read it?

A. I didn't because I am employed by a major

(Testimony of Thurman B. Story.)

company, and they expect my services if I am going to work.

Q. Did you ever have a checking account?

A. Yes.

Q. Did you sign checks?

A. We have a joint account, joint checking account.

Q. Do you read checks when they are made out to you?      A. By whom?

Q. By anybody else.

A. The only checks made out to me is by my company to me.

Q. Do you ever sign any receipts?

A. Oh, yes, occasionally like a small receipt for a newspaper bill or something like that.

Q. Do you read those before you sign them?

A. I do. Sometimes I glance at them before I sign them, because I usually know what they are, how much they are, and the nature of them. [98]

Q. Did you ever sign any other releases prior to this one?      A. Pertaining to this case?

Q. Pertaining to anything?

A. Oh, yes. Oh, yes, I have signed papers.

Q. And that is true of your wife, isn't it, too?

A. I don't know to what extent our legal documents she signed, no. I wouldn't know that because I haven't been married to her forever.

Mr. Bruno: I have no further questions, your Honor.

(Testimony of Thurman B. Story.)

Redirect Examination

By Mr. Fernandez:

Q. To what grade did you go in school, Mr. Story?      A. I finished the 7th.

Q. You didn't have an attorney at the time you signed this release, did you?      A. No, sir.

Q. Have you ever been in an automobile accident before?      A. No, sir.

Q. Did you ever sign—then you never signed a release from an automobile accident case before?

A. No, sir.

Mr. Fernandez: No further questions.

Mr. Bruno: I have no further questions, your Honor.

The Court: All right, step down.

(Witness excused.) [99]

Mr. Fernandez: If your Honor please, I don't know whether counsel has read this report by Dr. Besson.

The Court: Well, counsel is not required to, and I don't intend to insist that you do it at all. You have a perfect right not to, but if you would stipulate that the report might be received in evidence it would obviate the bringing of the doctor from wherever he is coming from. You don't have to stipulate to that at all, though.

Mr. Bruno: I assumed your Honor had that in mind when your Honor made the remark to counsel, and I read the report with that in mind. If the re-

port had been more consistent with reports rendered in this type of case, I was prepared to stipulate; but I believe Dr. Besson has not had experience in rendering these reports because there is no date stated as to when he saw her, how many times he saw her, what treatment he gave her, many things of that type, so unfortunately I feel forced to state that I can't reasonably in protecting the interests of my client stipulate to the introduction of the report.

Mr. Fernandez: Again I beg your Honor's indulgence on our side. As I said before, I was satisfied to call up Dr. Besson, but it was my understanding that all we were to do was to have Mrs. Story's testimony today.

I know I asked counsel his understanding, and I was about to come into your office, which I should have done, but I asked your bailiff also if that was his understanding, and I [100] believe their answer was in the affirmative.

The Court: Well, what is your suggestion now as to what you want to do?

Mr. Fernandez: Well, if your Honor please, I could call up and find out if we can get the doctor here.

The Court: You can't get them this afternoon from Sunnyvale.

Mr. Fernandez: Continue this to another date and we will be ready to go.

Mr. Bruno: May we do that, and maybe in the meantime your Honor will have an opportunity to consider the question of the release and we may ob-



viate the necessity of taking further evidence if your Honor agrees with my view.

Mr. Fernandez: I believe that is what counsel had in mind initially.

The Court: I would like to get the case completely in and get it behind me. When will you be able to get your doctor?

Mr. Fernandez: Well, I wouldn't profess to know, but I think probably Friday. I can try tomorrow, your Honor. We are prepared to proceed tomorrow.

The Court: How about you? Do you expect to put on any factual testimony or medical testimony?

Mr. Bruno: I would like to communicate with Nurse Dobler, who, as I have informed your Honor, and I am willing to [101] testify, is stationed with the United States Air Force in Germany, and was transferred sometime after the happening of the accident and before I was informed that the case was on trial and was scheduled to go to trial today.

I had, I guess, ten days' or two weeks' notice by reason of the fact that my associate was here in Court, and I found out then that she was in Germany. I would like an opportunity to at least communicate with her by letter or cablegram or somehow to clear up certain things, and I may not present any evidence at all.

The Court: Let's be frank about it. What do you expect to show from this person in Germany? Are you going to take her deposition? Is there any question about whether this was a rear-end collision?

Mr. Bruno: No. Here is the only possibility I

see: She says that the light was green when she approached the intersection, she saw these folks coming to a stop and assumed that they would start right up because the light had just changed. She assumed they would go right on after a moment's hesitation, and they didn't, and that caught her un-awares. That is about the extent of her testimony insofar as the factual situation is concerned.

The Court: Let's suppose she testified just to that situation. Would that be a sufficient defense to running into the rear of a car in front of you? [102]

Mr. Bruno: No, I wouldn't think so, your Honor. I haven't finished.

That was the one possibility, and I feel it wasn't any excuse, probably.

Secondly, and your Honor will appreciate this, I am prepared, if that is all we have, to stipulate to liability; but I can't very well do that never having talked to the client at all and never even having seen her. I would like to get her permission to do that, and if that is the case I won't have any evidence to produce at all.

I am going to recommend to her, frankly, that we stipulate to liability if the case goes to the liability aspect.

So I would suggest, your Honor, since the only evidence is a medical witness, which will be some expense to Mr. Fernandez, probably that is the only witness you will even hear. I have no medical to submit.

The Court: Have you had a medical examination made of the plaintiff?

Mr. Bruno: We have it. We won't, I am sure, introduce any factual testimony at all. So that would leave the probability of only one doctor testifying on the question of damages. So I would suggest it would probably be most suitable to the Court's convenience to continue the matter for a reasonable time for the Court to consider the question of the release, and if the Court decides adversely to the defendant we can fix [103] a date and present the doctor's evidence.

The Court: No, counsel, I am not going to do that. I would continue the case to a definite day and either side would produce such testimony as they may desire. When that is done and all the testimony is in, the matter will be submitted. That is the way I would like to do it.

Mr. Bruno: All right, your Honor.

The Court: It is then all submitted and all before the Court, both the legal issue and the factual issue, and we can then determine what is to be done.

Mr. Bruno: All right, your Honor. Would your Honor desire to continue the matter for sufficient time for me to send one communication to Germany and have time to get it back, and at that time I will be able to tell your Honor frankly there will or will not be any evidence from the defendant. I am pretty sure there will be no evidence from this defendant at all, your Honor.

The Court: In other words, this date to which we continue it, will we expect to have the doctor here at that time?

Mr. Fernandez: That is right.

Mr. Bruno: And I will be ready to proceed, too.

The Court: How much time will that take?

Mr. Fernandez: I think our doctor's testimony will take probably half a day. [104]

The Court: No, I mean how long will it take to get the information so that you are ready to go?

Mr. Bruno: I haven't communicated with Germany recently so I will have to make a guess, your Honor. May I request Friday, January 17?

Mr. Fernandez: That will be all right with us, too.

The Court: Well, do you think you will have a chance to get a reply back from Germany in that time?

Mr. Bruno: I had in mind to ask for as little time as possible.

The Court: But if you are going to do it, I want to give you ample time to get a reply.

(Further colloquy regarding continuance omitted.)

The Court: We will continue it until January 24th at 10:00 o'clock a.m.

(Thereupon, this case was continued to Friday, January 24, 1958, at the hour of 10:00 o'clock a.m.)

[Endorsed]: Filed September 15, 1958. [105]



[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1956

Sept. 27—Filed complaint—issued summons.

\* \* \*

Nov. 19—Filed answer of defendant.

1957

Mar. 28—Filed answers of plaintiff to interrogs. by  
Jean Dobler.

Apr. 1—Filed interrogs. by deft. to plaintiff.

Nov. 13—Filed notice by plaintiff of motion to set,  
Nov. 25, 1957, with cert. of readiness.

Nov. 25—Ordered, case for trial Dec. 19, 1957.

Dec. 18—Ordered case cont'd. to Dec. 30, 1957, for  
trial.

Dec. 30—Ordered case assigned to Judge Hamlin  
for trial this date.

Dec. 30—Court trial. Evidence and exhibits intro-  
duced and further trial cont'd. to Jan. 24,  
1958, at 10 a.m. Memos. to be filed by Jan.  
10 and 5 days thereafter.

1958

Jan. 24—Ordered further trial cont'd. to Jan. 31,  
1958.

Jan. 31—Further trial. Evidence and exhibits intro-  
duced and case submitted, without argu-  
ment.

\* \* \*

1958

- Feb. 13—Filed order for judgment for plaintiff vs. deft. in sum \$2,665.00. Counsel for plaintiff to submit findings, conclusions & judgment.
- Feb. 14—Mailed copies order to counsel.
- Feb. 26—Lodged judgment (by plttf).
- Mar. 10—Lodged findings & conclusions (by plttf).
- Mar. 25—Filed findings & conclusions.
- Mar. 25—Entered judgment—filed March 25, 1958—for plaintiff vs. Jean Dobler in sum \$2,665.00 and costs.
- Mar. 25—Mailed notices.
- Apr. 3—Filed notice by deft. of motion for new trial, April 10, 1958, before Judge Hamlin.
- Apr. 9—Ordered motion for new trial cont'd. to April 18, 1958.
- Apr. 18—Ordered after hearing motion for new trial submitted.
- Apr. 22—Filed order denying motion of defendant for new trial.
- Apr. 23—Mailed copies order to counsel.
- May 13—Filed notice of appeal by defendant.
- May 13—Filed appellant's designation of record on appeal.
- May 14—Mailed notices.
- June 4—Filed appeal bond of deft. in sum \$250.00.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by counsel for the appellant, Except the reporter's transcript of proceedings is not included for the reason it has not been filed of record in this case :

Excerpt from Docket Entries.

Complaint.

Answer.

Answers of Plaintiff to Interrogatories by Defendant.

Interrogatories by Defendant to Plaintiff.

Notice by Plaintiff of motion to Set Case for Trial.

Order of Court for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion for New Trial.

Order Denying Motion for New Trial.

Notice of Appeal.

Appeal Bond.

Designation of Record on Appeal.

Defendant's Exhibits A and B.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of June, 1958.

[Seal]                      C. W. CALBREATH,  
Clerk,

By /s/ MARGARET P. BLAIR,  
Deputy Clerk.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes the supplemental record on appeal herein, as designated by attorneys for the appellant:

Reporter's Transcript of Proceedings Dec. 30, 1957.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of September, 1958.

[Seal]                      C. W. CALBREATH,  
Clerk;

By /s/ MARGARET P. BLAIR,  
Deputy Clerk.



[Endorsed]: No. 16053. United States Court of Appeals for the Ninth Circuit. Jean Dobler, Appellant, vs. Oleta Story, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 16, 1958.

Docketed: June 19, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 16053

OLETA STORY,

Plaintiff and Appellee,

vs.

JEAN DOBLER, FIRST DOE, SECOND DOE  
and THIRD DOE,

Defendants and Appellants.

### STATEMENT OF POINTS

The points upon which appellant will rely on appeal herein are:

1. That the trial court erred in refusing to dismiss the complaint for failure to state a cause of action upon which relief can be granted, after plaintiff's presentation of the evidence and defendant's presentation of the evidence concerning the validity of the release which was signed by the plaintiff.

2. That the court erred in law as to the validity of the release signed by the plaintiff.

3. That the court rendered a judgment not based upon and against the evidence with reference to the validity of the release.

4. The court erred in finding the plaintiff without negligence or fault on her part in executing the release.

/s/ O. VINCENT BRUNO,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 23, 1958.